

# FEDERAL PUBLIC DEFENDER NEWSLETTER

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**No. 26**

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**October 2002**

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### **IN THIS ISSUE:**

Recent Supreme Court Cases . . . . .	1
Recent Sixth Circuit Decisions. . . . .	4
Summary of Defense Victories. . . . .	93
Index to Cases. . . . .	93

### **RECENT SUPREME COURT CASES**

***Bell v. Cone***, 122 S. Ct. 1843 (2002).

In 1982, Cone went on a crime spree and during his attempt to escape apprehension, he shot a police officer and two citizens. Cone temporarily eluded capture but eventually he broke into the home of an elderly couple, both of whom he brutally killed. After Cone's fingerprints and hair samples were found in the home where the homicides occurred, he was arrested and stood trial on a variety of crimes.

Cone was convicted of all charged offenses. Because the homicide offenses were death penalty eligible, a sentencing hearing was conducted during which Cone's counsel presented no mitigation or argument. The jury recommended the imposition of the death penalty.

Cone's conviction and sentence were affirmed on direct appeal and in the state post-conviction process. In 1997, Cone filed a § 2254 petition which was denied by the district court. Cone then appealed the denial of his habeas petition to the 6<sup>th</sup> Circuit.

The 6<sup>th</sup> Circuit affirmed the denial of Cone's habeas petition as to his conviction because of the overwhelming evidence of his

guilt. However, the court was troubled by Cone's counsel's failure to present any mitigating evidence or argument. The 6<sup>th</sup> Circuit held that defense counsel's failure to present mitigating evidence in a death penalty case is not a *per se* denial of the effective assistance of counsel.

Instead, where the failure to present evidence is part of a legitimate trial strategy, great latitude must be given to the decision of the attorney. However, "where a waiver is not based on sentencing strategy or on a strategy which a reasonable observer could credit as involving any logical defensible analysis, the attorney may have performed in a deficient manner." The 6<sup>th</sup> Circuit relied on *United States v. Cronin*, 466 U.S. 648 (1984) and found that the Tennessee court's conclusion that counsel was effective at the sentencing hearing was an "unreasonable application of" clearly established law announced by the Supreme Court in *Strickland* and *Cronin*.

The 6<sup>th</sup> Circuit based this decision on its conclusion that "an attorney's decision to present no evidence whatever in mitigation and, in addition, to offer no argument when his client faces the prospect of being sentenced to death may amount to a virtual abandonment of the adversarial process which results in injustice and which may support a presumption of prejudice."

Consequently, the 6<sup>th</sup> Circuit presumed prejudice as a result of counsel's behavior and did not reach the second prong of the *Strickland* standard. Instead, the court found

that “Cone did not have counsel during the sentencing phase of his trial. The prosecutor’s insistence that justice required Cone to be put to death was not subjected to meaningful adversarial testing.”

The Warden appealed the 6<sup>th</sup> Circuit’s decision to the Supreme Court. The Court held that the “contrary to” and “unreasonable application of” clauses in § 2254(d)(1) have independent meanings. A federal habeas court may issue the writ under the “contrary to” clause if the state court applies a rule different from the governing law set forth in Supreme Court cases, or if it decides a case differently than the Court has done on a set of materially indistinguishable facts.

In contrast, a federal habeas court may grant relief under the “unreasonable application of” clause if the state court correctly identifies the governing legal principle from the Supreme Court decision but unreasonably applies it to the facts of the particular case. The focus of the “unreasonable application of” clause is on whether the state court’s application of clearly established federal law was objectively unreasonable as opposed to an incorrect application.

The Warden argued that the 6<sup>th</sup> Circuit exceeded its statutory authority to grant relief under § 2254(d)(1) because the Tennessee Court of Appeals’ decision was neither “contrary to” nor an “unreasonable application of” *Strickland*. In response, Cone argued that he was entitled to relief under § 2254(d)(1)’s “contrary to” clause because the state court applied the wrong legal rule. In Cone’s view, *Cronic*, and not *Strickland*, governed the analysis of his claim that counsel rendered ineffective assistance at the sentencing hearing.

In *Strickland*, the Court elucidated a two-prong test for evaluating claims that defense counsel performed so incompetently that a defendant’s sentence or conviction should be reversed. In order to satisfy the *Strickland* standard, a defendant must show that his counsel’s representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.

Without proof of both the deficient performance and prejudice to the defense prongs, it cannot be said that the sentence or conviction “resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable.”

In *Cronic*, the Court considered whether the court of appeals was correct in reversing *Cronic*’s conviction under the 6<sup>th</sup> Amendment without inquiring into counsel’s actual performance or requiring the defendant to show the effect it had on the trial. In the course of deciding the question, the Court identified three situations implicating the right to counsel that involved circumstances “so likely to prejudice the accused that the cost of litigating their effect in a particular case is not justified.” In these three situations, the defendant is relieved of establishing prejudice. Instead, if a defendant can pigeonhole his case into any of these three scenarios, prejudice is presumed.

The first situation was the complete denial of counsel. In this situation, a trial would be presumptively unfair where the accused was denied the presence of counsel at “a critical stage.” Second, a similar presumption is warranted if “counsel entirely failed to subject the prosecution’s case to meaningful adversarial testing.” The final scenario is found in situations where counsel is called upon to render assistance under circumstances where competent counsel very likely could not.

Cone argued that his claim fit within the second exception identified in *Cronic* because his counsel failed to “mount some case for life imprisonment” after the prosecution introduced evidence in the sentencing hearing and gave a closing argument. However, the Supreme Court rejected Cone’s position and clarified that when it spoke in *Cronic* of the possibility of presuming prejudice based on an attorney’s failure to test the prosecutor’s case, it meant that the attorney’s failure must be “complete.”

In this case, Cone’s argument was not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole; but instead that his counsel failed to do so at specific points. The aspects of counsel’s performance challenged

by Cone --the failure to adduce mitigating evidence and the waiver of closing argument--are plainly of the same ilk as other specific attorney errors that had been subjected to *Strickland's* performance and prejudice two-prong test.

Consequently, the Court ruled that the state court correctly identified the principles announced in *Strickland* as those governing the analysis of Cone's claim. Moreover, the Court found no merit in Cone's contention that the state court's adjudication was "contrary to" clearly established federal law.

The final issue taken up by the Court was whether Cone could obtain relief on the ground that the state court's adjudication of his claim involved an "unreasonable application of" *Strickland*. However, in *Strickland*, the Court stated that "judicial scrutiny of counsel's performance must be highly deferential and that every effort must be made to eliminate the distorting effects of hindsight to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at that time."

As a result, even when a court is presented with an ineffective assistance claim not subject to § 2254(d)(1) deference, a defendant must overcome the presumption that under the circumstances, "the challenged action might be considered sound trial strategy." With that stated, the Court held that Cone's burden was to demonstrate that the Tennessee Court of Appeals applied *Strickland* to the facts of his case in an objectively unreasonable manner.

The Court parsed the record and concluded that this was a conclusion that was not supported by the record. Given the choices available to Cone's counsel, the Court could not state that the state court's application of *Strickland's* attorney-performance standard was objectively unreasonable. Consequently, the Court reversed the 6<sup>th</sup> Circuit's ruling.

***Hope v. Pelzer***, 122 S. Ct. 2508 (2002).

In 1995, Alabama was the only state that followed the practice of chaining inmates to one another in work squads. Alabama was also the only state that handcuffed prisoners to "hitching posts" if they either refused to work

or they otherwise disrupted work squads. Hope was handcuffed to a hitching post on two occasions.

On May 11, 1995, while Hope was working on a chain gang, he got into an argument with another inmate. Both men were taken back to the prison and handcuffed to a hitching post. Hope was released two hours later after a prison guard determined that the argument was caused by the other inmate.

During these two hours while he was tied to the hitching post (credit goes to Greg Allman), Hope was offered drinking water and a bathroom break every 15 minutes. Because Hope was slightly taller than the hitching post, his arms were above shoulder height and they grew tired from being handcuffed. When Hope tried to move his arms to improve his circulation, the handcuffs cut into his wrists causing pain and discomfort.

On June 7, 1995, Hope was punished more severely. Hope took a nap during the morning bus ride to the chain gang's work site. When the bus arrived at the work site, Hope was less than prompt in responding to an order to get off the bus. An exchange of vulgar remarks lead to a wrestling match with a guard. Hope was handcuffed, placed in leg irons, and transported back to the prison where he was again tied to the hitching post.

The guards made Hope take off his shirt and remain shirtless all day while the sun burned his skin. On this occasion, Hope was tied to the hitching post for seven hours. During this period, he was given water only once or twice and was given no bathroom breaks.

Hope filed a § 1983 action against the guards that hitched him to the post on both occasions. The district court concluded that the guards were entitled to qualified immunity and entered judgment in their favor. On appeal, the 11<sup>th</sup> Circuit concluded that the use of the hitching post for punitive purposes violated the 8<sup>th</sup> Amendment. Nevertheless, the court affirmed the district court's dismissal of Hope's § 1983 action after agreeing that the guards were entitled to qualified immunity.

The Supreme Court granted *certiorari* and held that the threshold inquiry that a court must undertake in a qualified immunity

analysis was whether the plaintiff's allegation, if true, established a constitutional violation. The Supreme Court upheld the 11<sup>th</sup> Circuit's finding that the handcuffing of Hope to the hitching post violated the 8<sup>th</sup> Amendment because, "the unnecessary and wanton infliction of pain constituted cruel and unusual punishment."

Among "unnecessary and wanton inflictions of pain" are those actions that are "totally without penological justification." To make this determination in the context of prison conditions, the Court was obligated to determine whether the guards acted with "deliberate indifference to the inmate's health and safety."

The Court found that the 8<sup>th</sup> Amendment violation alleged by Hope was obvious. Any of the guard's safety concerns had abated by the time Hope was handcuffed to the hitching post because he had already been subdued, handcuffed, placed in leg irons, and transported back to prison. "Despite the lack of an emergency situation, the guards knowingly subjected Hope to a substantial risk of physical harm and to unnecessary pain caused by handcuffs and the restrictive position of confinement for a seven hour period, with unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to the deprivation of bathroom breaks that created a risk of particular discomfort and humiliation."

Despite their participation in this conduct, the guards could be shielded from liability by the doctrine of qualified immunity if their actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." For a constitutional right to be clearly established, its contents must be sufficiently clear that a reasonable official would understand that what he was doing violated that right.

The Court held that the use of the hitching post as alleged by Hope was a clear violation of the 8<sup>th</sup> Amendment and the violation was so obvious that the guards had fair warning that their conduct violated the Constitution. Consequently, the Court held that the unlawfulness the guards' conduct should have been apparent and therefore they

were not entitled to the protection afforded by qualified immunity. Accordingly, this case was remanded.

### **RECENT SIXTH CIRCUIT CASES**

*Cook v. Stegall*, 295 F.3d 517 (6<sup>th</sup> Cir. 2002).

Cook was convicted of murder in 1982 and he exhausted his direct appeal in 1985; however, he did not file a § 2254 petition until May 21, 1997. Cook's motion to proceed *in forma pauperis*, that accompanied his § 2254 petition, was notarized on April 19, 1997.

For all convictions that became final prior to the enactment of the AEDPA (April 24, 1996) but where the habeas petition was filed after the enactment of the statute, the courts have created a one year statute of limitations within which all § 2254 petitions must be filed. This limitations period begins to run on the enactment date of the AEDPA. Consequently, the Warden moved to dismiss Cook's petition because it was filed after April 24, 1997.

In response to the Warden's motion to dismiss, Cook made three claims. First, Cook maintained that his daughter had timely filed the original petition and that the file-stamp that read May 21, 1997 was a mistake. Second, Cook claimed that the common law "mailbox rule" made his petition timely because he mailed it to his daughter on either April 19 or April 20, 1997 to photocopy and file. Finally, Cook claimed that because the prison copier was broken, the limitations period should be equitably tolled.

The district court rejected Cook's arguments and dismissed his petition. On appeal, Cook maintained that the district court improperly ruled that neither the "mailbox rule" nor equitable tolling made his petition timely. Moreover, Cook also argued that he lacked adequate notice of the applicability of the AEDPA's statute of limitations to his case because the statute was enacted after his conviction became final.

The first argument tackled by the 6<sup>th</sup> Circuit was whether Cook had adequate notice of the deadline within which to file his habeas petition. Although Cook filed his § 2254 petition in 1997, the 6<sup>th</sup> Circuit did not rule until 1999 that prisoners whose convictions

became final before the enactment of the AEDPA were subject to a one year limitations period. Nonetheless, and because by his admission that he was aware of the statute of limitations at least a “few” days before April 24, 1997, the court ruled that Cook was afforded a “reasonable time” to file his petition and the application of the one year limitations period to Cook did not violate due process.

Cook next argued that the common law “mailbox rule” should apply to his case thereby making his habeas petition timely filed. Under the “mailbox rule,” a habeas petition is deemed filed when the prisoner delivers it to prison officials for placement in the mail for filing in federal court. The rationale for this rule is that the date on which the prisoner gives the petition to the prison officials can readily be ascertained and any delays in receipt by the court should be attributed to the prison.

Cook argued that because he mailed his habeas petition to his daughter on April 19 or 20, it should be considered timely filed. However, the 6<sup>th</sup> Circuit refused to extend the “mailbox rule” to the situation where a prisoner mailed his petition to a third party for filing. The reluctance of courts to apply the “mailbox rule” to mailings to third parties stems from the belief that prisoners could circumvent a statute of limitations by mailing petitions to third parties for substantive revisions while claiming that their earlier date of mailing was also the effective filing date.

Finally, Cook argued that the statute of limitations should be tolled because the photocopier at the prison was broken. The following factors are weighed in deciding whether the statute of limitations should be tolled due to equitable considerations: 1) the prisoner’s lack of notice of the filing requirements; 2) the prisoner’s lack of constructive knowledge of the filing requirements; 3) the diligence in pursuing one’s rights; 4) the absence of prejudice to the warden; and 5) the prisoner’s reasonableness in remaining ignorant of the legal requirement for filing the claim.

The 6<sup>th</sup> Circuit ruled that equitable tolling relief should only be granted sparingly and that these factors were not exhaustive

considerations. Instead, the court would review whether to apply equitable tolling on a case-by-case basis.

The court applied the five factors to Cook’s case and ruled that the first four could be resolved in Cook’s favor. However, the court concluded that “Cook would not have ever have been in this hurried state had he not waited nearly 12 years to file his habeas petition.” This period during which Cook sat on his claims demonstrated to the court that “he was not diligent in pursuing his rights.” Accordingly, given Cook’s long period of unexplained idleness and the fact that he did have knowledge of the filing deadline at least a few days prior to April 24, 1997, the court refused to exercise its equitable powers and toll the statute the limitations.

*United States v. Hopkins*, 295 F.3d 549 (6<sup>th</sup> Cir. 2002).

Hopkins pled guilty to possession with the intent to distribute methamphetamine. At sentencing, Hopkins objected to the district court’s use of his statement that he made to a police officer about drug quantities that he distributed. This statement was made by Hopkins to the officer on the day that he was arrested. Moreover, Hopkins did not dispute the truthfulness of his statement. Instead, Hopkins claimed that he made the statement only after the officer assured him that his cooperation could only help, not hurt him.

Consequently, Hopkins contended that the officer’s assurances implied that no self-incriminating information that he provided would be used against him. By cooperating, Hopkins argued that he accepted the officer’s offer, thus forming an immunity agreement cognizable under USSG § 1B1.8(a). The district court used Hopkins’ statement to determine his relevant conduct after finding that a § 1B1.8(a) agreement had not been formed.

On appeal, Hopkins maintained that the district court erred by finding that a § 1B1.8(a) agreement had not been formed. USSG § 1B1.8(a) provides that “where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating

information provided pursuant to the agreement will not be used against the defendant, then such information should not be used in determining the applicable guideline range, except to the extent provided in the agreement.”

The 6<sup>th</sup> Circuit found that there was no significant dispute concerning the nature of the assurance that the officer made to Hopkins. After providing Hopkins with his *Miranda* rights, the officer merely explained that it was in Hopkins’ best interest to cooperate and that the more he cooperated, the more he could help himself.

However, the officer did not affirmatively represent to Hopkins that this statement would not be used against him. To support this conclusion, the 6<sup>th</sup> Circuit noted that Hopkins gave his statement shortly after being advised of his *Miranda* rights. Consequently, Hopkins would have heard the officer explain to him that “anything you say can be used against you in a court of law.”

Hopkins also waived his *Miranda* rights which meant that he understood that what he said could be used against him. Even though the officer explained to Hopkins that his cooperation could only help him and not hurt him, the officer chose his words carefully and did not explain to Hopkins that his statement could not be used against him. Consequently, the court ruled that the district court did not err in finding that a § 1B1.8(a) agreement had not been formed.

It was also noteworthy that Hopkins’ sentencing range was significantly reduced, pursuant to § 5K1.1, because of his cooperation. Consequently, the use of Hopkins’ statement did not violate the government’s promise that his cooperation would be helpful to him.

Next, Hopkins’ raised an argument that was not raised in the district court. Consequently, the 6<sup>th</sup> Circuit applied the plain error standard to resolve this question. In order for the error to be plain, it must be: 1) an error; 2) that is plain, *i.e.*, well-settled in the law; 3) that affects substantial rights; and 4) that would result in a serious miscarriage of justice.

From the record, it was apparent that the district court, as well as counsel,

erroneously understood that Hopkins’ statutory sentencing range was 10 years to life because the offense “involved 50 grams or more of methamphetamine.” However, Hopkins pled guilty to an offense involving 50 grams or more of a “mixture” containing methamphetamine. Consequently, the statutory sentencing range was 5 to 40 years.

On appeal, Hopkins insisted that he did not have the burden of showing that the application of the incorrect statutory sentencing range was determinative of his sentence. Instead, Hopkins argued that the error should be presumed to have affected his sentence unless the record affirmatively showed otherwise.

The 6<sup>th</sup> Circuit ruled that an error occurred in this case; however, any error was harmless. Hopkins was advised at the time of his plea that the statutory range was 10 years to life. Moreover, the record of the sentencing hearing was devoid of any grounds to believe that this error played any role in the imposition of sentence. Instead, the district court’s sentencing calculations were explicitly articulated and were based exclusively on the guidelines, without any mention of the statutory penalty.

Due to the clarity of the sentencing record, the 6<sup>th</sup> Circuit ruled that the district court’s intentions were manifest. Any misapprehension of the governing statutory penalty range did not affect the selection of the sentence imposed and was properly deemed harmless error. Consequently, the district court was affirmed.

***United States v. Dunham***, 295 F.3d 605 (6<sup>th</sup> Cir. 2002).

In 1999, federal agents executed a search warrant in Lansing, Michigan and they seized evidence that gave them reason to believe that Dunham was smuggling drugs into the various federal prisons where he was once incarcerated. Moreover, the evidence revealed that Dunham had some affiliation with two notorious prison gangs. Consequently, Dunham was served with a federal grand jury subpoena ordering him to submit handwriting exemplars and to permit photographs to be taken of his tattoos which investigators believe would conclusively establish his gang affiliation.

The subpoena did not require Dunham to testify. However, after consulting with an attorney, Dunham failed to appear before the grand jury which precipitated the return of a seven count indictment against Dunham and numerous other co-defendants.

Dunham pled guilty to a drug and firearm charge, and one of Dunham's co-defendants, Arturo Alderete-Monsivais, pled guilty to violating the Interstate Foreign Travel in Aid of Racketeering Enterprises (ITAR) statute which has a maximum penalty of 60 months in prison.

Dunham's presentence report recommended a two-level enhancement for obstruction of justice pursuant to USSG § 3C1.1 because he failed to appear before the grand jury. Dunham's objection to this enhancement fell on the deaf ears of the district court.

Alderete-Monsivais objected to the 60 month sentence that was recommended in his presentence report. Instead, Alderete-Monsivais requested the district court to impose a 41 month sentence. The length of this sentence was arrived at by subtracting from the 60-month statutory maximum the 19 months that Alderete-Monsivais had previously served in a Kansas prison for marijuana possession. The Kansas marijuana possession case, and the federal charges were both based on the same factual basis.

However, the district court pointed out that under the guidelines that were applicable to Alderete-Monsivais' case, his sentencing range was between 92-115 months. Noting that the 41-month sentence would not reflect the seriousness of Alderete-Monsivais's actual offense behavior, the court imposed the 60 month statutory maximum sentence.

Both Dunham and Alderete-Monsivais appealed their sentences and the first question considered by the 6<sup>th</sup> Circuit was whether the district court erred by applying the obstruction of justice guideline to Dunham's case. Under § 3C1.1, the government must prove, by a preponderance of the evidence, that the defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation." Dunham argued that the government failed to satisfy this burden

because it did not articulate facts that would support the conclusion that his failure to comply with the grand jury subpoena was willful.

However, the 6<sup>th</sup> Circuit rejected this argument and found that when a defendant has provided no adequate justification as to why he was unable to comply with the grand jury subpoena, the defendant's failure to appear is, by itself, sufficient to satisfy the government's burden that the defendant willfully obstructed or impeded the administration of justice. Dunham was properly served with a grand jury subpoena and he clearly disregarded his obligations as set forth in the subpoena. Consequently, the 6<sup>th</sup> Circuit affirmed the district court's application of § 3C1.1 to Dunham's case.

Next, Alderete-Monsivais argued that under USSG § 5G1.3(b), the district court was required to run his 60 month federal sentence concurrently with the 19 month state sentence that he had already completed. Consequently, Alderete-Monsivais maintained that he should have received a 41 month federal sentence.

However, the 6<sup>th</sup> Circuit found that § 5G1.3(b) only applies to a defendant serving an **undischarged** term of imprisonment at the time that his federal sentence was imposed. Therefore, § 5G1.3(b) did not require the district court to run his 60 month federal sentence concurrently to his Kansas sentence that he had previously completed because the Kansas sentence was already "discharged" at the time he was sentenced by the federal court.

The court ruled that there was a reasonable justification for § 5G1.3(b)'s distinction between discharged and undischarged sentences. This distinction ensures that "if two defendants who are convicted of identical state law crimes are subsequently convicted on a federal charge for the same conduct that formed the factual basis of their state convictions, then those two defendants will serve an equal term of imprisonment upon their federal conviction, regardless of whether their state sentence had been fully discharged." Accordingly, the court affirmed the sentences imposed.

*In re Shelton*, 295 F.3d 620 (6<sup>th</sup> Cir. 2002).

On October 25, 2000, Shelton was

sentenced to prison pursuant to his guilty pleas to violating 21 U.S.C. § 841 and 18 U.S.C. § 924(c). Although Shelton did not file a direct appeal, he later filed a motion captioned “Motion to Dismiss For Lack of Territorial Jurisdiction.” The district court, without giving prior notice to Shelton, construed this motion as one filed pursuant to 28 U.S.C. § 2255 and dismissed it.

Three months later, Shelton filed a second motion in the district court in which he argued that his counsel was ineffective by failing to challenge the validity of a search that lead to the discovery of a firearm. However, unlike his prior motion, Shelton labeled the second motion as one filed under § 2255. Moreover, Shelton argued in his second motion that he intended his first motion to be construed as one filed pursuant to Fed. R. Crim. P. 12(b)(2) and/or 33. The district court rejected Shelton’s argument and ruled that the second motion was a “second or successive” motion filed pursuant to § 2255. After making this finding, the district court dismissed Shelton’s second motion.

Consequently, Shelton filed a motion in the 6<sup>th</sup> Circuit, pursuant to 28 U.S.C. § 2244(b)(3)(A), seeking permission to file a second or successive § 2255 motion in the district court. The 6<sup>th</sup> Circuit recognized that many *pro se* prisoners file inartfully drafted post-conviction motions, without specifying a legal basis for their requested relief. Moreover, in an effort to assist *pro se* litigants unaware of the applicable statutory framework, district courts often re-characterize these filings as § 2255 motions.

However, an unintended byproduct of this practice is that the re-characterization of the motions may deprive a *pro se* litigant of the future opportunity to file a motion to vacate his sentence under § 2255. The AEDPA constrains a prisoner’s opportunity to file successive motions under § 2255 to narrowly limited circumstances *e.g.*, newly discovered evidence or a new rule of constitutional law that was previously unavailable.

The 6<sup>th</sup> Circuit decreed that a district court should not re-characterize a motion made under some other rule as a motion made under § 2255 unless the: (a) movant, with

knowledge of the potential adverse consequences of such re-characterization, agrees to have the motion re-characterized; or (b) court finds that, notwithstanding its designation, the motion should be considered as one filed under § 2255 because of the nature of the relief sought, and offers the movant the opportunity to withdraw the motion rather than have it re-characterized.

Because the district court, before re-characterizing Shelton’s first motion, did not provide him with appropriate notice and an opportunity to withdraw the pleading, the court ruled that the motion should not be counted against him for purposes of the bar on successive § 2255 motions. Consequently, the 6<sup>th</sup> Circuit ruled that Shelton’s motion to the 6<sup>th</sup> Circuit seeking permission to file a second or successive motion was moot as his second motion filed with the district court was not a “second or successive motion.”

***United States v. Lewis***, 296 F.3d 487 (6<sup>th</sup> Cir. 2002).

In 1998, Lewis and his nephew, Brandon Scott had a discussion with an individual who, unbeknownst to them, was an investigator for a company that provided encryption technology for digital satellite television transmissions. The investigator, William Sutherland, had seen an Internet posting which listed BOSS cards for sale. BOSS is a trading name for printed circuit boards with computer chips that are programed to allow unauthorized satellite users to protect their pirated signals by blocking the electronic countermeasures employed by the satellite television industry.

Sutherland sent an e-mail inquiry and in a reply, he was directed to use a telephone number to obtain additional information. When Sutherland called the number, Brandon Scott answered the phone. During their conversations, Scott told Sutherland that he would sell him an access card for \$75.00 and a BOSS blocker for \$199.00.

Later that day, Lewis called Sutherland and informed him that he wanted to “become a little bit better acquainted” before doing business with him. Lewis asked Sutherland if he was affiliated with any of the digital television networks or a law enforcement agency. Sutherland replied that he was not



and this self-serving response satisfied Lewis who stated that Sutherland would get the cards the following week.

When Sutherland received the cards, they were tested and they did not function. Consequently, Sutherland called Scott and informed him that the cards were defective. Moreover, Sutherland informed Scott that he was interested in placing a large order in the future if the cards were functional.

Scott agreed to fix the defective cards and he eventually provided Sutherland with functional cards. Lewis and Scott also agreed to sell Sutherland 50 access cards and 50 BOSS blockers for \$12,000. After exchanging the cards for the money, Scott was arrested. A search warrant was then executed on the home occupied by both Scott and Lewis and computer equipment and microchips were seized.

Both Lewis and Scott were indicted and Scott pled guilty. After Scott pled and was debriefed, the government filed a superceding indictment in which Lewis was charged with a number of money laundering offenses.

The money laundering charges were based on bank deposits to Scott's bank account and checks written on that account. Scott testified that Lewis told him to purchase access cards if he needed more to fill orders. Consequently, Scott paid for the access cards with a check and he also made deposits to that account from payments that he received for selling access and BOSS cards.

At Lewis' trial, Scott testified against Lewis as a government witness while Lewis categorically denied any involvement in wrongdoing. The jury was unimpressed with Lewis' story and they convicted him of numerous counts of fraud and money laundering.

On appeal, Lewis argued, for the first time, that the elements of money laundering present in the scheme for which he was convicted were incidental to what was a pattern of fraud. Ergo, Lewis maintained that the district court erred by calculating his offense level by using the money laundering guideline rather than the more lenient fraud guideline.

The 6<sup>th</sup> Circuit ruled that the district

court did not commit plain error by grouping all of Lewis' counts of conviction for sentencing pursuant to USSG § 3D1.4. Furthermore, after the charges were grouped, the district court properly chose the guideline with the highest offense level--the money laundering guideline--to determine Lewis' offense level. Finally, the 6<sup>th</sup> Circuit ruled that the district court's utilization of the money laundering guideline appropriately reflected the conduct engaged in by Lewis. Consequently, the district court's application of the money laundering guideline was affirmed.

*Anthony v. DeWitt*, 295 F.3d 554 (6<sup>th</sup> Cir. 2002).

In 1996, Anthony was charged with killing Patricia Smith. Several months prior to the murder, Smith filed felony theft charges against Anthony's friend, Rommell Knox, for stealing a ring from her apartment when Knox was performing a routine pest extermination. Knox, who had a prior criminal record, feared going to prison for the theft.

Consequently, Knox and Anthony drove to Smith's apartment complex with Rommell's brother, John Knox, and Rommell's girlfriend, Mary Payne. When they got to the apartment complex, John and Rommell Knox stayed in the car while Payne and Anthony walked to Smith's door. As Smith opened the door, she was shot and killed by Anthony.

The police initially had no immediate suspects. However, a few days later, Detective Lacy received a phone call from a female named Regina Knox (Rommell's wife) who claimed to have information regarding Smith's murder. Detective Lacy persuaded Regina to come to the station where she was interviewed. As a result of that interview, the investigation focused on Rommell and John Knox, Anthony, and Payne.

Anthony and Rommell Knox were charged with aggravated murder and tried separately. At Anthony's trial, the trial court conducted a preliminary hearing out of the presence of the jury, to determine the admissibility of Payne's "hearsay" testimony. At the conclusion of the hearing, the trial judge ruled that the state had made a *prima facie* showing of the existence of a

conspiracy. Consequently, Payne was permitted to testify as to statements that she attributed to Rommell Knox.

Payne stated that Rommell pointed out Smith's apartment and he asked her if she would accompany Anthony to the door. Anthony wanted Payne to knock on Smith's so that he could talk to her about dropping the charges against Rommell. Rommell told Payne that he wanted her to knock on the door because the woman would not open the door for a black man (Anthony) but would open it for a white woman (Payne).

Payne testified that after she knocked on Smith's door, Smith began unlocking the door and Anthony then told Payne that she could return to the car. On her way back to the car, Payne heard a gunshot and when she turned, she saw Anthony running toward her with a gun. Anthony then grabbed Payne by the arm and said "move bitch" and ran to the car. As the four individuals drove away from Smith's apartment, Payne opened the door and vomited. Upon seeing this, Rommell twisted her arm and threatened to kill her if she told anyone about the incident.

Regina Knox also testified for the prosecution about statements that her husband, Rommell, made to her after he returned home from Smith's house. Rommell informed Regina about the homicide and of his intention to pay Anthony and Payne \$250.00 for their role in the killing. Moreover, Rommell asked Regina to lie about his whereabouts on the night in question.

Anthony presented an alibi defense during which his aunt and uncle testified that on the evening of Smith's murder, Anthony was at home with them. However, the jury rejected the alibi defense and Anthony was convicted and sentenced accordingly.

Following his conviction, Anthony filed a direct appeal asserting that the state failed to lay a proper foundation to admit the hearsay statements of Rommell Knox and that even with a proper foundation, the hearsay evidence was improperly admitted. The state appellate court determined that Mary Payne testified to the following two out-of-court statements: (1) that Rommell asked her to knock on Smith's door so that Anthony could talk to her about dropping the charges; and (2)

that Rommell threatened Payne's life if she told anyone what happened that night.

The appellate court affirmed Anthony's conviction after concluding that the testimony was admissible. The Supreme Court of Ohio denied Anthony's request for leave to appeal and his post-conviction petition was also denied.

Anthony then filed a § 2254 petition wherein he argued that the state failed to lay a proper foundation for the admission of hearsay statements attributed to Rommell Knox. However, the district court determined that Payne's recounting of Rommell's statements did not deny Anthony his 6<sup>th</sup> Amendment right to confront witnesses because the statements did not constitute hearsay "in light of the circumstances present."

Moreover, the court ruled that the admission of Rommell's out-of-court statements to Regina Knox did not violate the Confrontation Clause because they bore a sufficient indicia of reliability based on the fact that they were: made shortly after the crime within the confines of the husband-wife relationship, made voluntarily, and against Rommell's penal interests. Finally, the district court noted that even if Regina's testimony was hearsay, the statements did not have a "substantial and injurious effect" on the jury's verdict.

Under the AEDPA, a district court is not authorized to grant a habeas petition with respect to any claim that was adjudicated on the merits in state court unless the adjudication resulted in a decision that (1) was contrary to or involved an unreasonable application of, clearly established federal law; or (2) was based on an unreasonable determination of the facts in light of the evidence presented to the state court.

Under the "contrary to" clause, a federal habeas court may grant the petition if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. In contrast, under the "unreasonable application" clause, a federal habeas corpus may grant the petition if a state court

identified the correct governing legal principle from the Supreme Court's decisions but unreasonably applied that principle to the facts of the petitioner's case.

The 6<sup>th</sup> Circuit framed the issue presented in the case *sub judice* as whether the out-of-court statements of Rommell Knox, admitted through the testimony of Mary Payne and Regina Knox during Anthony's trial, violated Anthony's 6<sup>th</sup> Amendment right to confront witnesses. Hearsay evidence is admissible only when the (1) declarant is unavailable; and (2) hearsay statement bears an adequate indicia of reliability. Reliability is inferred when the out-of-court statement falls within a firmly rooted hearsay exception. If the out-of-court declarant is also a co-conspirator of the defendant, the prosecution is not obligated to establish the unavailability of the declarant or the reliability of his statements.

Under Ohio law, a statement of a co-conspirator is not admissible until "the proponent of the statement makes a *prima facie* showing of the existence of the conspiracy by independent proof." Moreover, the Ohio Supreme Court has held that the premature admission of co-conspirator statements, prior to the establishment of the conspiracy, is harmless error so long as independent proof of the conspiracy was admitted into evidence before the case was submitted to the jury.

Ohio R. Evid. 801(D)(2)(e) differs from the traditional common law formulation of the co-conspirator exception to the hearsay exclusion because under the Ohio Rule, statements made during the concealment phase of the conspiracy are also admissible.

In this case, Payne testified to two out-of-court statements made to her by Rommell Knox: (1) Rommell asked her to accompany Anthony to Smith's apartment and knock on the door; and (2) Rommell threatened her life if she told anyone about the killing.

Hearsay is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." However, evidence is not hearsay if it is not offered to prove the truth of the

matter asserted. In this case, Payne was a participant in the events that occurred at Smith's apartment on the night of the murder. As such, Payne witnessed and heard everything about which she testified. Thus, Payne's testimony did not constitute hearsay and the Confrontation Clause was not violated because the out-of-court statements were admissible to explain her actions on the night of the murder and her inaction in approaching the authorities afterwards.

Consistent with this theory of admissibility, the court ruled that Rommell's statements to Payne were not admitted to prove that Rommell actually believed Anthony intended to talk to Smith about dropping the charges. Instead, the statements were admissible to show why Payne went to Smith's apartment with Anthony. Moreover, Rommell's threat to harm Payne was admissible to show why she hesitated to contact the police.

The next question addressed by the 6<sup>th</sup> Circuit was whether the admission of Regina Knox's testimony regarding her husband's out-of-court statements violated Anthony's right to confront his accusers. The district court ruled that the admission of the statements did not violate Anthony's 6<sup>th</sup> Amendment rights because they bore a sufficient indicia of reliability.

The 6<sup>th</sup> Circuit agreed with the district court's analysis and held that out-of-court statements that do not fit within a firmly rooted hearsay exception do not violate the Confrontation Clause if they possessed particularized guarantees of trustworthiness. However, the guarantees must be inherent in the circumstances surrounding the testimony itself; it is insufficient that other evidence corroborates the statement.

In *Dutton v. Evans*, 400 U.S. 74 (1970), the Supreme Court identified factors "widely viewed as determinative of whether a statement may be placed before the jury although there is no confrontation of the declarant." These factors include whether the: (1) hearsay statement contained an express assertion of past fact; (2) declarant had personal knowledge of the fact asserted, (3) possibility that the statement was based upon

a faulty recollection is remote in the extreme; and (4) circumstances surrounding the statement made it likely that the declarant fabricated the assertion of fact.

The court applied these factors to this case and concluded that the admission of Rommell's statements to Regina Knox at Anthony's trial did not violate the Confrontation Clause. The court found that the statements "carried particularized guarantees of trustworthiness" because Rommell's statements to Regina Knox telling her that he: wanted Smith shot because he did not want to go to jail; intended to pay Anthony and Payne \$250.00 for their services; and that he wanted her to lie about his whereabouts on the evening of the murder, were declarations against Rommell's penal interest.

Finally, the court ruled that even if the statements were admitted in error, their admission would constitute harmless error because they did not have a "substantial and injurious effect or influence in determining the jury's verdict."

**Rockwell v. Yukins**, 296 F.3d 507 (6<sup>th</sup> Cir. 2002).

For the second time, Warden Yukins reprised her role as an appellant after the district court granted habeas relief to Sharon Rockwell. Rockwell and her husband, Edward Rockwell, had three sons. One of the sons, acting with two friends, attempted to kill Edward by cutting the brake lines on his car.

After this attempt failed, the boys made another unsuccessful attempt on Edward's life by hitting him on the head with a baseball bat. Although Sharon was not present on either occasion, she had previously engaged the boys in discussions about killing Edward.

Consequently, Sharon was charged with conspiracy to commit murder in violation of Michigan law. At a pretrial hearing, Sharon's lawyer described that her purpose in participating in the discussions was to let the boys vent the extreme hatred that they harbored against their father who allegedly physically and sexually abused them when they were younger. The defense theory posited that Sharon did not agree to commit the murder. Instead, she hoped to derail the

murder through "some sort of talk therapy."

In connection with this "therapy defense" Sharon hoped to prove at trial that Edward had abused his sons. However, the prosecution moved *in limine* to exclude this evidence. The trial court granted the prosecution's motion after holding that the evidence was not "material" under Michigan R. Evid. 404.

Despite her asserted defense, Sharon did not testify and the jury convicted her of conspiracy to commit murder. Sharon's conviction was affirmed by the Michigan Court of Appeals which found that the trial court did not abuse its discretion by excluding evidence of Edward's alleged prior acts of abuse against his children. This ruling was affirmed by the Michigan Supreme Court.

Sharon then filed a § 2254 petition which was granted because the district court ruled that the state trial court erred by excluding evidence of the alleged abuse. The district court concluded that this ruling violated Sharon's constitutional right to present a defense and "no reasonable jurist could conclude otherwise."

When the Warden first appealed the grant of habeas relief, the 6<sup>th</sup> Circuit vacated the judgment on the ground that the district court should not have reviewed a "mixed" petition containing both unexhausted and exhausted claims. Consequently, the case was remanded with a suggestion that the district court could re-enter its original decision after allowing Sharon to dismiss her unexhausted claims.

On remand, the district court adopted this suggestion after Sharon moved for dismissal of her unexhausted claims. As a result, the district court dismissed the unexhausted claims and re-entered judgment in favor of Sharon on the evidentiary question.

The Warden again appealed to the 6<sup>th</sup> Circuit and the court now considered the merits of the evidentiary question. Because Sharon filed her habeas petition after the enactment of the AEDPA, "an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of the state court shall not be granted with respect to any claim that was adjudicated on the merits

in state court proceedings unless the adjudication of the claim-- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States . . .”.

Sharon maintained in her habeas petition that the state court’s adjudication of her claim involved an “unreasonable application of” Supreme Court precedent. In order to prove this contention, Sharon must do more than persuade a federal habeas court that the Michigan judiciary’s application of federal law was incorrect.

An unreasonable application of federal law is different from an incorrect or erroneous application of federal law. Making the “unreasonable application of” inquiry, the court must ask “whether the state court’s application of clearly established federal law was objectively unreasonable.”

In this case, the Michigan Court of Appeals concluded that the probative value of the evidence of Edward’s alleged abuse of his sons was substantially outweighed by the danger of unfair prejudice that might ensue if the evidence was admitted. Although this conclusion may or may not have been erroneous, the 6<sup>th</sup> Circuit concluded that it could not conclude that it represented an objectively unreasonable application of clearly established Supreme Court precedent.

In *Davis v. Alaska*, 415 U.S. 308 (1974), the Court held that cross-examination is the principle means by which the believability of a witness and the truth of his testimony are tested. Against this background, the Court concluded that “the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on the witness’s testimony which provided a crucial link in the proof of Davis’ act.”

However, in the case *sub judice*, the evidence that Edward abused his sons was being offered not to show bias on the part of a crucial witness against Sharon. Instead, the evidence was being offered to shore up Sharon’s “therapy defense.” The Michigan Court of Appeals recognized that the abuse

evidence was marginally relevant, but the court concluded that its probative value was substantially outweighed by the danger of unfair prejudice - “danger that the jury would be tempted to acquit Sharon not because of any sense that she was innocent of conspiring with her sons to kill Edward, but because of the sense that the killing would be too good for such a man.”

Thus, the court found that the constitutional right asserted by Sharon was not the 6<sup>th</sup> Amendment right of confrontation. Instead, the right being asserted was a 5<sup>th</sup> Amendment due process right to present a defense. However, this 5<sup>th</sup> Amendment right is not an unlimited right to present evidence without regard to reasonable evidentiary restrictions.

Instead, in *United States v. Sheffer*, 523 U.S. 303 (1998), the Supreme Court explicitly recognized that “a defendant’s interest in presenting evidence may have to bow to accommodate other legitimate interests in the criminal trial process.” Consequently, the 6<sup>th</sup> Circuit ruled that it was not objectively unreasonable for the Michigan court to conclude that “other legitimate interests in the criminal trial process” outweighed Sharon’s interest in buttressing her projected testimony with evidence of her husband’s abusive behavior. Accordingly, the decision of the district court was reversed.

***United States v. Winbush***, — F.3d —, 2002 WL 1558803 (6<sup>th</sup> Cir. 2002).

Winbush pled guilty to robbing two banks in violation of 18 U.S.C. § 2113(a). During each robbery, Winbush presented a note to the teller which read “THIS IS A HOLD-UP I HAVE A GUN 100's 50's and 20's.” Winbush did not either exhibit a gun or make any oral statements during either bank robbery. Nonetheless, the district court enhanced Winbush’s sentence by two levels pursuant to USSG § 2B3.1(b)(2)(F) after finding that the written statement constituted a “threat of death.”

Winbush appealed this determination and urged the 6<sup>th</sup> Circuit to find that merely advising the victim that one is armed, unaccompanied by any words, actions, or gestures of a threatening nature was

insufficient to establish a “threat of death.” However, the 6<sup>th</sup> Circuit rejected Winbush’s position and instead established “black letter law” by holding that a robber’s note stating “I HAVE A GUN” constitutes a threat of death under § 2B3.1(b)(2)(F) warranting a two level enhancement. This language would “instill in any reasonable bank teller a belief that a failure to comply with the robber’s instructions would result in being fatally shot.” Consequently, the application of the two level enhancement was affirmed.

**Leslie v. Randle**, 296 F.3d 518 (6<sup>th</sup> Cir. 2002).

In 1986, Leslie pled guilty to rape and felonious assault in violation of Ohio law. As a result, Leslie was sentenced to serve a minimum of 18 years in state prison. In 1997, the Ohio sexual predator statute was amended and the Hamilton County Court of Common Pleas adjudicated Leslie as a sexual predator. Leslie appealed this determination claiming that Ohio’s sexual predator statute was unconstitutional as it applied to him. However, the Ohio appellate courts were unsympathetic and affirmed the trial court’s decision.

Leslie then filed a § 2254 petition claiming that the Ohio sexual predator statute violated various provisions of the United States Constitution. However, the district court denied Leslie’s petition after finding that he failed to meet the “in custody” requirement of § 2254 and he appealed.

Although Ohio has had a sex offender registration statute since 1963, the statute was substantially amended in 1996 and 1997 after Leslie pled guilty. Unlike the old statute, under the new law, “a sentencing court must determine whether sex offenders fall into one of the following classifications: “(1) sexually oriented offender; (2) habitual sex offender; or (3) sexual predator.”

Depending on how the individual is classified, different registration and community notification requirements apply. Leslie stipulated that under the definitions provided in the amended statute, he was a “sexual predator.” As a sexual predator, Leslie would be obligated to “register with his county sheriff and provide a current home

address, a name and address of his employer, a photograph, and any other information required by the BCI when he is finished serving his prison sentence.”

Moreover, Leslie would also be obligated to provide his license plate number for each motor vehicle that he owned as well as to verify his current home address every 90 days. Leslie’s failure to comply with the registration and verification provisions of the Ohio statute would be a felony. Finally, Leslie would be obligated to fulfill these requirements for the balance of his life or until a court determined that he was no longer a sexual predator.

A federal court has jurisdiction to consider a habeas petition on “behalf of a person in custody pursuant to the judgment of a state court only on the ground that *he is in custody in violation of the Constitution or laws or treaties of the United States.*” The 6<sup>th</sup> Circuit framed the question presented in this case to be whether Leslie’s petition for habeas relief contained a claim for which he was “in custody” within the meaning of § 2254.

The custody requirement of the habeas statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. Collateral consequences of conviction, such as the ability to vote, engage in certain businesses, hold public office, or serve as a juror are insufficient to satisfy the “in custody” requirement for habeas jurisdiction.

The 6<sup>th</sup> Circuit concluded that although Leslie was currently incarcerated, he was not seeking relief from the conviction or sentence upon which his confinement was based. Instead, Leslie claimed that Ohio’s sexual predator statute, as applied to him, was unconstitutional. The court viewed the classification, registration, and notification requirements of the sexual predator statute as “more properly characterized as a collateral consequence of conviction rather than as a restraint on liberty.”

The 6<sup>th</sup> Circuit arrived at this conclusion because the Ohio sexual predator statute placed no restraints on Leslie’s movement. Instead, the statute merely required Leslie to “verify his address with the

sheriff every 90 days even if he never leaves his house.” Thus, Leslie’s ability to move to a different community or residence was not conditioned upon the approval of a governmental official.

Finally, the Ohio Supreme Court had previously ruled that the sexual predator statute was remedial and not punitive in nature. The Ohio Supreme Court’s conclusion that the sexual predator statute was a form of civil regulation provided additional support for the 6<sup>th</sup> Circuit’s conclusion that the classification, registration, and community notification provisions were more analogous to collateral consequences than to severe restraints on freedom of movement such as parole. Consequently, the 6<sup>th</sup> Circuit affirmed the district court’s conclusion that Leslie did not meet the “in custody” requirement of § 2254.

*United States v. Chavis*, 296 F.3d 450 (6<sup>th</sup> Cir. 2002).

Chavis was indicted for causing another person to make a false statement to a federally licensed firearms dealer on or about September 13, 1997. In the same indictment, Chavis was also charged with possession with the intent to distribute more than five grams of crack on or about June 9, 1999. After being arraigned, Chavis filed a motion to sever these two counts based on Fed. R. Crim. P. 8(a). However, Chavis’ severance motion was denied by the district court.

At Chavis’ trial, Lorrie Chmielewski testified that Chavis and Donald Langbein asked her to purchase firearms in September 1997 because Chavis was not old enough to purchase a handgun. Because Chmielewski was of age to purchase a firearm and did not have a felony record, she could easily pass any background check performed by law enforcement.

According to Chmielewski, Chavis drove her to a gun store in Columbus. At the store, Chavis and Langbein picked out the guns that they wanted and Chmielewski filled out the ATF form 4473. Chmielewski paid a deposit for the guns with money supplied by Chavis and Langbein. Finally, Chmielewski told the sales person at the store that she was buying the guns for herself. In return for her

services, Chmielewski claimed that Chavis gave her crack prior to arriving at the gun store.

After Chmielewski was notified that she had passed the background check, she returned to the gun store with Chavis and Langbein where she once again affirmed that she was the actual purchaser of the firearms. Chmielewski paid for the guns, carried them out of the store, and gave them to Chavis and Langbein. Chmielewski again claimed that she was provided crack in exchange for her services.

Almost two years later, a Columbus police officer was conducting a bicycle patrol in a public housing complex when he saw Chavis standing behind a brick wall. When Chavis noticed the officer approaching, he threw his arms back and dropped a small bag. The officer picked up the bag, which was about 10 feet from Chavis, and noticed that it contained a substance resembling crack.

A crime lab technician analyzed the substance and determined that it was crack and that it weighed 5.1 grams at the time of her examination. However, at the time of the trial, the substance weighed only 4.13 grams due to the evaporation of water that was contained in the crack. An ATF agent also testified that a quantity of 5.1 grams suggested that the crack was intended for distribution, rather than personal use.

Chavis admitted in his testimony that Chmielewski had illegally purchased a firearm for him. However, Chavis denied supplying Chmielewski with crack in return for her services. Instead, Chavis testified that he gave Chmielewski money for the firearm whereas Langbein gave her the crack. Finally, Chavis testified that he did not possess the bag containing the 5.1 grams of crack at the time of his arrest.

Chavis made a Rule 29 motion for judgment of acquittal which was denied. Moreover, Chavis requested an instruction on the lesser included offense of simple possession of more than five grams of crack. However, Chavis did not renew his motion to sever the counts at the conclusion of the evidence.

The jury convicted Chavis of the

firearms count but acquitted him of possession with intent to distribute crack cocaine. Instead, the jury convicted Chavis of simple possession of more than five grams of crack.

At sentencing, Davis maintained that his offense level should be based only on the handgun that was purchased for himself and not the handgun that was purchased for Langbein. However, the district court overruled this objection after concluding that both handgun purchases were reasonably foreseeable results of jointly undertaken criminal activity of Chavis and Langbein.

Moreover, Chavis argued that he was entitled to receive a reduction for acceptance of responsibility. The district court rejected this argument because although Chavis admitted to his participation in illegally purchasing a handgun, he denied possessing crack and denied his responsibility for one of the handguns. After sentence was imposed, Chavis filed a timely notice of appeal.

The first issue addressed by the 6<sup>th</sup> Circuit was whether there was sufficient evidence to support the jury's verdict that Chavis possessed more than five grams of crack. Chavis maintained that the jury could not have found a quantity of more than five grams because the crack weighed only 4.13 grams at the time of trial.

The 6<sup>th</sup> Circuit concluded that there was sufficient evidence to convict Chavis of possessing more than five grams of crack. When the technician weighed the crack, she determined its weight to be 5.1 grams. Moreover, the technician testified that it was not unusual for crack to lose weight over time as a result of water evaporation and that a reduction in weight from 5.1 grams to 4.13 grams was possible. Consequently, the jury was entitled to believe this testimony and to conclude that, at the time of his arrest, Chavis was in possession of more than five grams of crack.

Chavis also argued that there was insufficient evidence to prove that he had an intent to distribute. The district court conceded that the question was close but denied Chavis' motion citing the quantity of crack that he possessed as well as his possession of \$95.00 cash, a cell phone, and a

pager.

The 6<sup>th</sup> Circuit also agreed that the question was close but ruled that a reasonable jury could have accepted the ATF agent's testimony that five grams of crack was consistent with street dealer quantity and that a user would generally be in possession of "only \$20.00 rocks weighing about 1/10th of a gram each." The combination of the drug quantity along with Chavis' possession of: the cash, a cell phone, and a pager supported an inference that he had the intent to distribute the crack. Therefore, the district court did not err by sending this count to the jury.

The next question considered by the 6<sup>th</sup> Circuit was whether the district court erred by denying Chavis' motion to sever the two counts of the indictment based upon misjoinder of offenses. Chavis argued that the joinder of firearm and crack offenses did not satisfy the requirements of Fed. R. Crim. P. 8 because the two offenses were not similar in nature, they were not part of the same transaction, and they were not part of the same scheme or plan.

The district court denied Chavis' motion after finding that he had not shown a risk of jury confusion or prejudice. The 6<sup>th</sup> Circuit concluded that if joinder of multiple defendants or multiple offenses does not comply with the requirements of Rule 8, the district court has "no discretion on the question of severance." This determination must be made based only on an examination of the allegations on the face of the indictment.

The government maintained that Chavis waived this issue by failing to renew his motion to sever at the close of all the evidence. The government was correct that if Chavis' motion to sever counts was made pursuant to Fed. R. Crim. P. 14 "it will be deemed to be waived if it is not renewed at the end of all of the evidence."

However, the 6<sup>th</sup> Circuit found that Rule 14 addresses different situations than Rule 8. Rule 14 authorizes a defendant to move for severance in situations in which joinder of multiple offenses or defendants is proper under Rule 8, but nonetheless would be prejudicial to the defendant. In this case,



Chavis clearly made his motion for relief from improper joinder under Rule 8(a) and not Rule 14.

The 6<sup>th</sup> Circuit rejected the government's argument and ruled that although a Rule 14 motion to sever must be renewed at the close of the evidence or it is waived, there is no such requirement for a Rule 8 motion.

The 6<sup>th</sup> Circuit then held that the joinder of the drug and firearms offenses in this case was improper. There was no evidence or allegation in the indictment suggesting that Chavis' possession of crack in June 1999 was part of the "same act or transaction" as the purchase of the handgun in September 1997 or that the two offenses were otherwise "connected together or constituting parts of a common scheme or plan."

Moreover, there was no common thread of an "overarching criminal scheme connecting these two crimes." When it all boiled down, the government's case for joinder depended upon whether the two offenses were of a "same or similar character." The 6<sup>th</sup> Circuit ruled that the firearms charge was not of the "same or similar character" as the drug charge. These two crimes: had elements that were distinct from one another; were separated by a two year gap in time; and involved different participants.

Nonetheless, even though joinder of the two offenses was improper, the 6<sup>th</sup> Circuit next reviewed whether the misjoinder was harmless error under the Fed. R. Crim. P. 52(a). Under this regime, reversal is only permitted for trial errors that "affect substantial rights." An error involving misjoinder affects substantial rights "only if the misjoinder results in actual prejudice because it had a substantial and injurious effect or influence in determining the jury's verdict." To make this determination, the court reviewed a number of factors including whether: "there was overwhelming evidence of guilt; limiting instructions were given to the jury; and evidence concerning the misjoined counts would have been admissible in separate trials absent joinder."

The 6<sup>th</sup> Circuit ruled that the district court's limiting instruction significantly

reduced the potential for prejudice to Chavis. Moreover, the fact that the jury did not convict Chavis of possession with intent to distribute crack offered further support for the conclusion that they did not label Chavis as a "drug dealer" based upon his involvement in the handgun purchase. Finally, the court found that the presence of overwhelming evidence of Chavis' guilt in the firearm offense was a factor that clearly supported the government's argument that any error was harmless error. Consequently, Chavis' conviction was affirmed.

The court next considered Chavis' argument that the district court erred by considering both handguns purchased by Chmielewski as part of his relevant conduct. Chavis again argued that he purchased only one handgun for himself while Langbein acted independently in purchasing the other.

The testimony established that both Chavis and Langbein jointly approached Chmielewski about purchasing the handguns and traveled to the gun store on two occasions together with Chmielewski. Moreover, both handguns were purchased at the same time. Consequently, the 6<sup>th</sup> Circuit ruled that the evidence was sufficient to support the conclusion that Chavis and Langbein acted jointly in causing Chmielewski to make false statements to a federally licensed firearms dealer.

Finally, Chavis argued that the district court erred by refusing to reduce his offense level for acceptance of responsibility pursuant to USSG § 3E1.1. The 6<sup>th</sup> Circuit found that normally Chavis' denial of involvement in the drug charge alone would render him ineligible for acceptance of responsibility credit. This conclusion would typically be justified because "a defendant must accept the responsibility for all counts before he is entitled to a reduction in sentence for acceptance of responsibility."

However, the 6<sup>th</sup> Circuit did not apply this rule to Chavis' case because the counts of conviction were improperly joined in the indictment. Consequently, because the joint trial of the two offenses was improper, Chavis was not obliged to accept responsibility for both offenses in order to qualify for the

adjustment.

Nonetheless, the court concluded that the district court did not err in denying Chavis an acceptance of responsibility reduction because the court properly determined that Chavis had not accepted responsibility for either offense. Instead, Chavis attempted to “parse out” his guilt as to the handgun offense by admitting responsibility for only one of the two handguns and denying responsibility for the handgun purchase by Langbein.

Therefore, Chavis’ denial of responsibility, as relevant conduct, for the second handgun was a valid ground for denying him acceptance of responsibility adjustment. Furthermore, Chavis also denied any connection to the crack that was found ten feet from him. Under USSG § 3E1.1, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility. Consequently, the 6<sup>th</sup> Circuit ruled that the district court did not err in denying Chavis’ request for a two level reduction for acceptance of responsibility.

***United States v. Burns***, 298 F.3d 523 (6<sup>th</sup> Cir. 2002).

Antonio Burns, Anthony Harden, Jerome Harden, and Michael Jordon were all charged in a multi-count indictment alleging numerous violations of the federal narcotics laws. Burns was charged in Count 1 with engaging in a continuing criminal enterprise(CCE) in violation of 21 U.S.C. § 848 and in Count 2 with participating in a conspiracy to distribute more than 20 kilograms of crack in violation of 21 U.S.C. § 846. Burns and the others also faced numerous other charges that do not need to be noted for the purposes of this newsletter.

Most of the evidence adduced at trial against Burns and his co-defendants came from the testimony of witnesses who, after their arrest on drug charges, cooperated with the government in its investigation into Burns’ suspected drug trafficking activities. Seven of these witnesses testified at the trial of these four men that Burns supplied crack to the conspiracy. Moreover, these seven witnesses testified that Anthony and Jerome Harden and

Jordon assisted Burns in carrying out the objects of the conspiracy.

The *Reader’s Digest* version of the facts is included herein. During the summer of 1998, Anthony and Jerome Harden and Jordan weighed and packaged crack at Mary Baker’s Covington, Kentucky apartment. The usual practice was for the Hardens and Jordon to process the crack while Burns watched. After the drugs were packaged, Burns sent Jerome Harden or Jordon to round up buyers who were then brought to Mary Baker’s apartment to make their purchases.

The Hardens and others also sold crack under Burns’ direction. One of Burns’ largest customers, Lee Keene, testified that he bought at least 24 kilograms of crack from Burns. While incarcerated and awaiting the trial of his case, Keene agreed to cooperate with the government. Keene contacted Burns in an attempt to dispose of a quantity of crack that Keene had hidden at his residence.

Keene called Burns from the detention center and during a recorded conversation, Keene agreed to return 30 ounces of crack that Burns had provided him prior to Keene’s arrest. Burns told Keene that he would pick up the crack from Keene’s associate, who was an undercover agent, and would cancel the drug debt that Keene owed. During a second recorded call, a police officer, posing as Keene’s brother-in-law, agreed to deliver the 30 ounces of crack to Burns.

Burns arrived at the meeting place 15 minutes early and conducted counter-surveillance. When Burns spotted a police presence, he left the area. After the meeting time had passed, the officer called Burns and Burns accused Keene of “trying to set me up.” The officer told Burns that he was going to “throw the shit in the river” to which Burns responded “throw the shit in the river” but he then claimed that he did not know what the officer was talking about.

A few weeks later, Jamie Walker was subpoenaed to appear before the federal grand jury that was investigating Burns. Walker agreed to cooperate with the government. During a recorded conversation with Burns, Walker asked what he should say to the grand jury if he was asked about his drug suppliers.

Burns told Walker to falsely state that Burns was not his supplier. Instead, Burns instructed Walker to tell the grand jury that Keene was Walker's source of crack.

In an incident involving two of Burns' co-defendants, but not Burns himself, Ryan Lloyd, who was cooperating with the police, contacted Paul Green to purchase crack at a Newport bar. Although Green did not have any crack at the time, he negotiated a sale on Jordon's behalf for \$400. The drugs were to be delivered at the Saratoga Bar in Newport.

Later that day, Green told Anthony Harden that he needed to go to the bar to consummate a drug deal. Harden agreed to drive Jordon, Green, and Eugene West to the bar. When they arrived at the bar, Anthony Harden and Jordon stayed in the car while Green and West went in to complete the sale.

Green sold Lloyd \$400.00 worth of crack and moments later West robbed Lloyd at gunpoint. Lloyd escaped to a police surveillance vehicle while Green and West ran to their car and police stopped the car as Anthony Harden attempted to drive away. In the car, the officers found \$4,000 in cash and a firearm under Anthony Harden's seat. Moreover, \$5,000 in cash was found in the glove compartment. Anthony Harden told an arresting officer that he had been paid to drive the others to do a drug deal and that he had driven on other occasions for the same purpose.

On March 20, 1998, Newport police stopped Burns' car after Carol Baldwin informed the police that Burns was driving without a valid driver's license. When Burns produced a fake Ohio driver's license, he was arrested for possessing a forged instrument. Following his arrest, officers searched Burns' car and located a piece of paper showing eight names paired with dollar amounts. Moreover, the officers confiscated \$1,780 that they found on Burns' person.

Four months later, two Covington police officers responded to a report of a "juvenile black male wearing all red clothes armed with a large revolver" in an area notorious for drug trafficking. The officers responded to the scene and observed a person fitting this description.

Once Burns, Jerome Harden, Jordon

(dressed in a red shirt), and Green saw the officers, they got into a car that was registered to Burns. An officer stopped the car and recognized Jerome Harden as the driver. However, Harden did not have a driver's license. The officers then arrested Harden for driving without a license and ordered everyone in the car to keep their hands on the seats in front of them while the officers looked for weapons.

Green kept his hands on the back seat so as to partially cover a plastic bag containing more than 16 grams of crack. The officers conducted a full search of the car and its occupants and discovered more than \$5,000 in the glove compartment, a hand gun in the trunk, \$402 in cash, and a pager on Harden's person.

Based on this overwhelming and unflattering evidence, a jury, not surprisingly, found Burns, Anthony and Jerome Harden, and Michael Jordon guilty of crimes related to their drug dealing. The first question considered by the 6<sup>th</sup> Circuit was whether there was sufficient evidence to support Burns' conviction for engaging in a CCE.

In order to convict a defendant of engaging in a CCE, the government must prove that the: (1) defendant committed a felony violation of federal narcotic laws; (2) violation was part of a continuing series of three or more drug offenses committed by the defendant; (3) defendant committed the series of offenses in concert with five or more persons; (4) defendant acted as an organizer, supervisor, or manager with regard to these five or more persons; and (5) defendant obtained substantial income or resources from the series of violations.

Burns maintained that the indictment was defective because it did not alleged three specific drug transactions as forming the basis for the continuing series element. However, the 6<sup>th</sup> Circuit ruled that an indictment charging a CCE is sufficient for constitutional purposes if it articulates the elements of the crime charged.

In this case, the indictment charged all of the essential elements of the CCE offense and made it clear that the government intended to prove a conspiracy that included at least three drug violations from November

1997 to January 1999. Each of the predicate acts occurred during the period specified in the charge; therefore, the court found that the indictment was not defective.

Burns also claimed that the jury was improperly instructed regarding the CCE charge. A jury deliberating a CCE charge “must unanimously agree not only that the defendant committed some continuing series of violations but also that the defendant committed each of the individual violations necessary to make up that continuing series.”

In this case, the jury was instructed that it must “unanimously agree to at least three related violations underlying this CCE charge.” The 6<sup>th</sup> Circuit found that by requiring a jury to unanimously agree to “at least three related violations” the instruction properly made clear to the jury that it must unanimously find that Burns committed the same three or more violations. The 6<sup>th</sup> Circuit then parsed the record and concluded that there was overwhelming evidence to support the jury’s verdict on each element and affirmed Burns’ CCE conviction.

The 6<sup>th</sup> Circuit next reviewed the sufficiency of the evidence to support the four defendants’ conspiracy convictions under 21 U.S.C. § 846. In order to convict a defendant of a drug conspiracy, the government must prove “the existence of an agreement to violate the drug laws and that each conspirator knew of, intended to join, and participated in the conspiracy.”

Each defendant “need not have had knowledge of every phase of the conspiracy to have intended to facilitate the common scheme.” The 6<sup>th</sup> Circuit found that the government’s witnesses provided the jury with ample evidence that Anthony and Jerome Harden, and Jordon possessed and distributed crack in concert with Burns and one another.

However, an interesting question was presented by Jerome Harden who maintained that the government failed to prove that he ratified his membership in the conspiracy after he became an adult. The alleged conspiracy began while Jerome Harden was a juvenile and continued until well after he celebrated his 18<sup>th</sup> birthday.

The 6<sup>th</sup> Circuit held that “a defendant who enters into a conspiracy prior to his 18<sup>th</sup>

birthday can be tried as an adult if he continues into the conspiracy after that time.” The 6<sup>th</sup> Circuit ruled that the evidence of Jerome Harden’s participation in the conspiracy after he became an adult was plentiful as that of his conduct while he was a minor. Consequently, the court held that the jury could have reasonably concluded that Jerome Harden ratified his participation in the conspiracy after he became an adult.

Anthony Harden and Jordon were charged in count 4 of the indictment with violating the Travel Act (18 U.S.C. § 1952(a)(3)). To prove a violation of the Travel Act, the government must prove three elements: (1) the defendant traveled in interstate or foreign commerce; (2) with intent to promote, manage, establish, carry on, or to facilitate the promotion, management, establishment, or carrying on of an unlawful activity; and (3) that the defendant thereafter performed or attempted to perform an act of promotion, management, establishment, or carrying on of any unlawful activity.

Jordon argued that the government failed to offer proof of the third element -- that an overt act occurred after he traveled across state lines from Ohio to Kentucky. Jordon argued that he did not violate the Travel Act because his failure to receive payment from the drug sale in the Newport bar prevented the intended unlawful act from being consummated.

The 6<sup>th</sup> Circuit rejected this argument and ruled that Jordon committed an overt act after his travel to Kentucky in furtherance of the unlawful activity. By associating with Green in Kentucky and by remaining in the car that Green intended to use to leave the scene of the drug sale at the Newport bar, Jordon placed himself in a position to: (1) receive immediate payment from Green after the sale in Kentucky; (2) provide surveillance and support; and (3) physically aid Green should danger arise. Consequently, Jordon acted, while in Kentucky, in furtherance of the intended unlawful act.

Burns next challenged his convictions for using a telecommunications facility in the commission of a federal crime. The factual basis for these charges was that Burns used the telephone to negotiate his receipt of 30

ounces of crack from Keene to retire Keene's drug debt. To prove a violation of 21 U.S.C. § 843(b), the government must establish that Burns: (1) knowingly and intentionally used a communications facility; and (2) to facilitate the commission of a federal narcotics crime. The 6<sup>th</sup> Circuit ruled that because Burns knew that he was using a telephone and because the knowing and intentional possession of crack was a federal crime, the government elicited sufficient evidence to support the jury's verdict.

Nonetheless, Burns argued that even if the evidence was sufficient, his conviction should be vacated because the district court denied his request for a jury instruction on his entrapment defense. However, a defendant is entitled to an entrapment instruction only when there is sufficient evidence from which a reasonable jury could find entrapment. Two elements must be proven to establish a valid entrapment defense: (1) government inducement of the crime; and (2) lack of predisposition on the part of the defendant to engage in the criminal activity.

Where the evidence clearly establishes that the defendant was predisposed, the district court is justified in denying an entrapment instruction. In this case, the 6<sup>th</sup> Circuit found that Burns was the poster child for predisposition in trafficking in crack. Consequently, the district court did not err in denying Burns' request for an entrapment instruction.

Burns next challenged his conviction for attempting to persuade Walker to lie before the federal grand jury. In order to sustain its burden on this charge, the government must establish that Burns attempted to: (1) corruptly persuade; (2) a witness in an official federal proceeding; and (3) with the intent to influence that witness' testimony. The 6<sup>th</sup> Circuit easily concluded that the facts supported the jury's verdict on this count. Burns attempted to corruptly persuade Walker by urging him to: lie about the basis of their relationship; deny that Walker knew Burns was a drug dealer; and disclaim that Burns was Walker's source of crack. Finally, a grand jury proceeding was an "official federal proceeding."

The next issue confronted by the 6<sup>th</sup>

Circuit was the propriety of the district court's rulings on the motions to suppress physical evidence filed by Burns and Jerome Harden. Burns sought to suppress physical evidence found in his car and motel room. Jerome Harden sought to suppress evidence found in Burns' motel room where he was staying at the time of the search. Moreover, Harden sought to suppress evidence taken from Burns' car which Harden was driving at the time it was stopped and searched.

The court first addressed Burns' motion and concluded that a "decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." The officers stopped Burns because Baldwin, who knew Burns personally, had described Burns' car to the police and informed them that Burns did not have a valid drivers license.

Burns then consented to the search of his car. The court concluded that Burns' consent was given voluntarily. Moreover, the court found that the search of Burns' motel was also justified by his consent. The police recorded the dialogue with Burns wherein he gave his consent to search the motel room. In the exchange, Burns engaged in friendly conversation and there was no hint that he had been coerced.

The court next addressed Jerome Harden's motion to suppress evidence found in the car that he was driving. The stop of Harden's car was not based on probable cause to believe that a traffic violation had occurred. Instead, the stop was made to investigate a non-traffic related crime. Police can stop and briefly detain a person for investigative purposes if the officer has reasonable suspicion, supported by articulable facts, that criminal activity may be afoot, even if the officer lacks probable cause. However, such an investigative stop is limited to questioning regarding the suspected criminal activity and a cursory search for weapons to protect the officers' safety.

In this case, Harden was driving a vehicle owned by Burns and he was pulled over because the officers observed it leaving an area notorious for drug activity. Moreover, the vehicle was carrying a black male dressed in red who fit the description of an individual

reported to be brandishing a large revolver. Consequently, the court ruled that this information justified stopping the vehicle.

Once the vehicle was stopped, the fact that one of the passengers was thought to have a gun provided the officers with reasonable suspicion to believe that a weapon might be present. Consequently, the officers were entitled to conduct a limited search for weapons.

The court found that the seizure of the bag of crack that was partially concealed by Green's hand in the back seat was reasonable because the bag was in plain view. Once contraband in plain view is discovered, the 4<sup>th</sup> Amendment does not require it to be ignored. Consequently, the bag could be seized without a warrant.

The firearm found in the trunk was also properly seized. An officer may conduct a warrantless search of every part of a legitimately stopped vehicle, including the trunk and all containers, if there is probable cause to believe that the vehicle contains contraband. Once the bag of crack was found, the officers had probable cause to believe that other contraband might be in the car. Consequently, the officers were justified in searching the trunk.

The court next found that Jerome Harden's motion to suppress physical evidence found in Burns' motel room was properly denied because Burns had common authority and control over the room that allowed him to consent to the search. Common authority or control is defined as the "mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit inspection in his own right and that the others have assumed the risk that one of their members might permit the common area to be searched."

The court applied this definition to this case and concluded that Burns had the right to consent to a search if he had the right to use or possess the property. Burns rented the room, had a key, and was the sole registered occupant. Consequently, Burns had the right to use or possess the room and had the ability to consent to the search regardless of Harden's

presence in the room.

The next issue considered was whether the district court violated the rights of all four defendants by not requiring the jury to determine, beyond a reasonable doubt, the amount of crack on which they were being sentenced. Instead, the district court made this determination at the sentencing hearings using a preponderance of the evidence standard.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court ruled that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum, must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi* further held that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."

However, *Apprendi* is not triggered where the defendant received a term of imprisonment within the statutory maximum that would have applied even without the enhancing factor such as drug amount. Moreover, *Apprendi* does not apply where a fact, not found by the jury, increased the lower limit of the sentencing range, as long as the sentence actually imposed was less than the upper limit of the range.

Anthony and Jerome Harden as well as Michael Jordon were each convicted of conspiracy to possess with intent to distribute crack in violation of 21 U.S.C. § 846. The court found that the indictment set forth the statutory penalty range of between 0 and 20 years imprisonment. Anthony and Jerome Harden as well as Michael Jordon were all sentenced to terms of imprisonment that were less than 20 years. Consequently, any *Apprendi* error was harmless because it did not affect the defendants' substantial rights.

Burns was the unfortunate recipient of a life sentence based on his CCE conviction. The 6<sup>th</sup> Circuit ruled that Burns' life sentence was within the statutory maximum for that offense without regard to the amount of drugs involved because 21 U.S.C. § 848(a) has a statutory penalty range of between 20 years and life imprisonment. Consequently, the court ruled that Burns' sentence did not violate *Apprendi*.

Moreover, Burns received two other life sentences on substantive counts that were ordered to be served concurrently with the sentence imposed on the CCE conviction. Even though Burns made a colorable *Apprendi* argument on these other two sentences, the court found that any error was harmless because the sentence imposed on the CCE conviction was not imposed in error.

Finally, the government cross-appealed the district court's decision to reduce the offense levels of Anthony and Jerome Harden, and Michael Jordon by four levels for their "minimal roles" that they played in this enterprise. A minimal role reduction is intended to cover defendants who are "plainly among the least culpable of those involved in the conduct of the group."

USSG § 3B1.2 requires that in determining a defendant's level of culpability, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as a minimal participant.

The district court concluded that Anthony and Jerome Harden as well as Michael Jordon were minimal participants. In drawing this conclusion, the court focused on the fact that several of the co-conspirators who testified at trial appeared to have greater roles in the conspiracy. However, the 6<sup>th</sup> Circuit found that the district court's conclusion that these three men had minimal roles "discounts a significant body of evidence that all three were aware of the full scope of Burns' enterprise and regularly assisted Burns in processing and selling crack on a daily basis."

The three men each carried, delivered, packaged, and sold crack in a partnership with Burns for over one year. Consequently, the 6<sup>th</sup> Circuit ruled that the district court erred by reducing the three offense levels for their "minimal roles." The sentences of these three men were reversed and their cases were remanded for resentencing.

*United States v. Butler*, 297 F.3d 505 (6<sup>th</sup> Cir. 2002).

Butler established and operated two businesses, National Consumer Research (NCR) of which he was president and Fulfillment Services Corporation (FSC). Butler represented to the IRS that NCR leased

its employees from FSC. Butler used payroll companies to pay the NCR/FSC employees and the employees' checks showed the deduction of federal taxes. However, instead of paying the deducted amounts to the federal government, Butler retained the money and failed to file employer tax returns as required by federal law.

Butler was indicted for conspiracy to impede or obstruct the IRS in collecting employment taxes in violation of 18 U.S.C. § 371 and five counts of employment tax evasion in violation of 26 U.S.C. § 7201. The same grand jury later returned a superseding indictment adding information about FSC to some of the counts.

Butler moved to dismiss the superseding indictment because he alleged that the government breached an agreement not to prosecute him. The district court conducted an evidentiary hearing on this motion at which Butler's former attorney and the attorney's paralegal testified. Butler's witnesses testified that at a meeting in Washington, D.C., the government agreed not to prosecute Butler in exchange for his cooperation in locating his business partner, Kriston Manning. Moreover, part of this alleged agreement also required Butler to pay his personal income taxes.

According to Butler's attorney and the paralegal, this agreement was confirmed in subsequent telephone conversations although both conceded that there was no documentary evidence of the agreement. In contrast, government witnesses acknowledged that the meeting occurred but denied that the government attorney ever agreed not to prosecute Butler. Instead, the government attorney who was present at the meeting testified that she did not have the authority to make such an agreement.

The district court ruled that there was no agreement among the parties after concluding that the defense witnesses' testimony on the issue was "patently unbelievable." After the motion to dismiss was denied, Butler signed a plea agreement agreeing to plead guilty to tax evasion in violation of 26 U.S.C. § 7201.

After Butler pled guilty, a presentence report was prepared which recommended a

two level enhancement for use of a sophisticated means to perpetrate the tax evasion scheme. The report also recommended the reduction of Butler's offense level for acceptance of responsibility. However, even though the government agreed in the plea agreement that Butler was entitled to an acceptance of responsibility reduction, it maintained after the report was disclosed, that he was not entitled to the reduction.

Consequently, after the report was disclosed, Butler moved to withdraw his guilty plea after alleging that the government breached the plea agreement. The district court conducted a hearing on this motion and concluded that the government had not breached the plea agreement.

The district court enhanced Butler's sentence for "use of a sophisticated means" and reduced his offense level for acceptance of responsibility. The court then imposed a sentence of 12 months of imprisonment, three years of supervised release, a fine of \$3,000, and restitution to be determined by the tax court or the IRS. Butler then filed a timely appeal.

The first issue litigated on appeal was whether the statute of limitations precluded Butler's indictment for the tax evasion count to which he pled guilty. To determine whether the indictment was timely filed, Butler claimed that the operative date of the tax evasion count was December 31, 1991. Therefore, Butler maintained that because the superseding indictment was returned on February 26, 1998, the district court should not have been able to accept his guilty plea because the six year statute of limitations had run.

However, the 6<sup>th</sup> Circuit concluded that the district court properly accepted Butler's guilty plea because the statute of limitations had not yet run on the offense to which he pled guilty. The statute of limitations begins to run for tax evasion on the date of the "last affirmative act of evasion." In this case, December 31, 1991 was not the date of the last affirmative act of evasion. Instead, December 31, 1991 was the day the winter quarter of 1991 ended. The taxes for that quarter were not due until January 31, 1992.

Consequently, at the earliest, January 31, 1992 was the date of the last affirmative act of evasion. Even so, Butler maintained that the six year statute of limitations barred the prosecution because the superseding indictment was filed February 26, 1998.

The 6<sup>th</sup> Circuit rejected this argument and ruled that a superseding indictment relates back to the date of the original indictment if it "does not broaden the charges set forth in the original indictment." The information inserted in the tax evasion count of the superseding indictment added "underlying details" that were necessary to understand the tax evasion scheme. Thus, the court ruled that the superseding indictment related back to the original indictment which was filed on January 29, 1998. Consequently, the original indictment was filed three days before the six year statute of limitations ran.

The next issue litigated in the 6<sup>th</sup> Circuit was whether the district court erred by denying Butler's motion to dismiss the superseding indictment on the ground that the government breached an informal agreement not to prosecute him. To secure a defendant's cooperation in a criminal investigation, the government may informally grant him immunity in exchange for his testimony.

An agreement not to prosecute is contractual in nature and subject to contract law standards. The 6<sup>th</sup> Circuit concluded that the district court did not commit clear error by finding that the defense witnesses were not credible. Consequently, the 6<sup>th</sup> Circuit affirmed the district court's denial of Butler's motion to dismiss.

Butler maintained that the district court erred by denying his motion to withdraw his guilty plea because the government breached the plea agreement by: (1) using incriminating information that he provided to sustain a two level enhancement for using a "sophisticated means" in violation of the plea agreement; (2) contesting an acceptance of responsibility reduction in violation of the plea agreement; and (3) failing to move for a downward departure from the guideline range even though Butler provided substantial assistance.

Butler maintained that he met with law enforcement authorities and provided them



with information that the government then used to support a two level enhancement, in violation of the plea agreement. Paragraph 4 of the plea agreement stated that “pursuant to § 1B1.8 of the Federal Sentencing Guidelines, the government agrees that any self-incriminating information so provided will not be used against the defendant in determining the applicable guideline range for sentencing, or as a basis for upward departure from the guideline range.”

The government responded that “every single piece of evidence that was used relative to sentencing was in the file of the United States Attorney and the IRS prior to the meeting.” The government argued that Butler’s base offense level should be enhanced by two levels for use of a “sophisticated means” pursuant to USSG § 2T1.1(b)(2).

According to the government, Butler kept “the money concealed from the IRS behind another business entity name, used post-office drop boxes and aliases, and successfully put off agents through incomplete referrals and presentation of tax protestor defenses.”

The 6<sup>th</sup> Circuit reviewed the evidence and quickly concluded that all of this evidence was available to the government prior to the return of the superseding indictment. Consequently, the district court did not err by concluding that the government did not breach the plea agreement by arguing for a “sophisticated means” enhancement.

Butler also claimed that the government breached the plea agreement by contesting his reduction for acceptance of responsibility. However, even though the government agreed in the plea agreement that Butler had accepted responsibility, the plea agreement explicitly conditioned the government’s support of the reduction on Butler’s continued acceptance of responsibility.

The district court awarded Butler a reduction for acceptance of responsibility and the 6<sup>th</sup> Circuit found that it was reasonable for the government to argue that Butler failed to accept responsibility when he testified that he had no knowledge of the failure of NCR to pay its employment taxes until 1992 and he

cooperated with the IRS as soon as he learned of the problem.

Finally, the 6<sup>th</sup> Circuit ruled that the government did not breach the plea agreement by failing to move for a downward departure based on Butler’s substantial assistance. The plea agreement clearly stipulated that the government “may move the court for a downward departure for substantial assistance but whether the motion would be filed was within the discretion of the government.”

Consequently, the government was within its discretion in not moving for a downward departure for substantial assistance as outlined in the plea agreement. Accordingly, the 6<sup>th</sup> Circuit affirmed the district court’s finding that the government did not breach the plea agreement and also did not abuse its discretion in denying Butler’s motion to withdraw his guilty plea.

Finally, Butler attacked his sentence by arguing that the district court erred by: (1) applying a two level enhancement for use of a “sophisticated means;” (2) failing to impose a “split” sentence; and (3) imposing restitution in an amount to be determined by the tax court or the IRS.

The district court applied the sophisticated means enhancement to Butler’s base offense level after concluding that “it appears to the court that there was a fairly elaborate scheme employed here and that Mr. Butler took part in that scheme. He used post-office drop boxes, aliases, and put off some of the incomplete referrals.”

The sophisticated means enhancement clearly requires the sentencing court to look at the actions taken by the individual. In particular, “a defendant involved in a complex or repetitive tax conspiracy is not automatically given a sophisticated means enhancement if his own personal involvement did not constitute sophisticated means.”

The 6<sup>th</sup> Circuit held that the evidence presented by the government demonstrated that Butler’s personal involvement in the scheme constituted sophisticated means. Butler set up shell companies and was president of NCR. Moreover, although Butler may not have set up the various bank accounts or post-office boxes, he used them in his day-to-day business. Butler also used an alias and

provided the IRS with evidence that was given in an attempt to mislead the IRS. Consequently, the 6<sup>th</sup> Circuit affirmed the district court's application of the sophisticated means enhancement.

Because Butler's offense level was within Zone C of the Sentencing Table, he was eligible for a "split sentence" under USSG § 5C1.1(d). However, the district court put Butler "in the box" for 12 months. Butler did not object to the district court's failure to apply the split sentence guideline at the sentencing hearing. Consequently, the 6<sup>th</sup> Circuit reviewed the district court's failure to apply the guideline for a plain error.

The 6<sup>th</sup> Circuit concluded that § 5C1.1(d) merely gives the district court the **discretion** to sentence a defendant either to a term of imprisonment or to a "split" term of imprisonment and community confinement or home detention. Consequently, the district court's failure to sentence Butler to a split term was not error. Instead, this was within the discretion of the district court.

The final sentencing issue addressed by the 6<sup>th</sup> Circuit was whether the district court erred by sentencing Butler to make restitution to the IRS in an amount "to be determined through the tax court or the IRS." Butler failed to object to the imposition of restitution at the sentencing hearing so the 6<sup>th</sup> Circuit also reviewed this issue for plain error. The district court ordered Butler to make restitution as a condition of supervised release. The Victim Witness Protection Act (VWPA) as codified at 18 U.S.C. § 3663 and § 3664 does not apply to tax cases. However, the 6<sup>th</sup> Circuit concluded that restitution that is ordered in tax cases must be made in conformity with the provisions of the VWPA.

Under the VWPA, a district court may not delegate the determination of the **amount** of restitution. Moreover, the district court does not abrogate its judicial authority under the VWPA when it delegates the setting of a restitution payment schedule to the defendant's probation officer. However, such a delegation is only permissible provided that the court first establishes the amount of restitution.

In this case, the district court delegated the determination of the amount of Butler's

restitution to "the tax court or the IRS." The 6<sup>th</sup> Circuit ruled that this delegation was impermissible as an abrogation of the court's judicial authority and was therefore plain error. Consequently, the case was remanded in order for the district court to properly determine the amount of restitution.

*Norton v. Ashcroft*, 298 F.3d 547 (6<sup>th</sup> Cir. 2002).

This case arises out of Norton's protests at the Planned Parenthood Clinic in Kalamazoo, Michigan. Norton and others regularly picketed, prayed, handed out literature, and attempted to counsel individuals who entered the abortion clinic.

Norton and her compatriots would typically stand on the public sidewalk on either side of the clinic's driveway. Norton claimed that the protestors did not intend to block access to the clinic. However, on some occasions, drivers would stop in the clinic driveway to take a leaflet from or speak with the protesters.

Concerned with potential obstruction, clinic employees made several complaints to state and federal law enforcement authorities. In response, the United States Marshal requested Norton to attend a meeting with law enforcement and clinic employees. Norton attended the meeting with her attorney at which federal agents discussed the protestors' activities of handing out leaflets and speaking with individuals in cars stopped in the clinic's driveway.

The agents advised Norton that she was causing drivers to stop in the driveway and impeding their access to the clinic. Norton was informed that her group's "pattern of activity" could be considered a violation of the Freedom of Access to Clinic Entrances Act (18 U.S.C. § 248).

Norton was informed that she would not risk prosecution if she picketed, prayed, and counseled across the street from the clinic. After this meeting, Norton was not initially deterred and she returned to the clinic and prayed on the sidewalk next to the clinic. However, Norton did attempt to stay 30 feet from the driveway so as to avoid stopping cars.

There were several incidents between Norton and clinic employees and visitors that

prompted her to leave the clinic and not return as she feared prosecution under § 248. Instead, Norton filed suit challenging the constitutionality of § 248 and she also sought declaratory and injunctive relief. The district court dismissed Norton's facial challenges to § 248 and refused to grant either declaratory or injunctive relief. Consequently, Norton appealed to the 6<sup>th</sup> Circuit.

The 6<sup>th</sup> Circuit joined several other circuits that have considered this issue and found that § 248 does not, on its face, violate the 1<sup>st</sup> Amendment. The court ruled that § 248 is not directly applied to speech but rather prohibits three types of conduct - use of force, threat of force, and physical obstruction- none of which are protected by the 1<sup>st</sup> Amendment.

Moreover, the court held that to the extent that § 248 implicates protected expression, it does so in a content-neutral manner. Because there was a content-neutral restriction, § 248 only needed to withstand intermediate scrutiny. A statute passes intermediate scrutiny if: (1) it furthers an important or substantial government interest; (2) the government interest is unrelated to the suppression of free expression; and (3) the incidental restriction on alleged 1<sup>st</sup> Amendment freedoms is no greater than is essential to the furtherance of that interest.

The 6<sup>th</sup> Circuit ruled that § 248 furthers an important government interest "in ensuring access to reproductive health services, an interest that is unrelated to any incidental suppression of free expression." Moreover, § 248 only forbids physical interference with people going about their own lawful private business and both specifically exempts protected 1<sup>st</sup> Amendment activity and leaves open ample alternative means for communication. Consequently, the court ruled that the statute passed intermediate scrutiny.

Norton also contended that § 248 was impermissibly vague. A statute is vague if it does not give "a person of ordinary intelligence a reasonable opportunity to know what is prohibited." The court easily found that § 248 was not impermissibly vague.

Next, Norton mounted an overbreadth challenge to § 248. A statute is overbroad if it reaches a substantial number of impermissible

applications. The court found that § 248 prohibits only a limited range of conduct - the use or threat of force or non-violent physical obstruction, intended to prevent access to, or the provision of, reproductive services. However, § 248 does not apply to any "expressive conduct protected from legal prohibition by the 1<sup>st</sup> Amendment." Consequently, the court ruled that § 248 was not impermissibly overbroad.

The district court dismissed Norton's "as applied" challenge pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. A court lacks subject matter jurisdiction if the claim is not ripe for judicial review. The ripeness doctrine exists "to ensure that courts decide only existing, substantial controversies, not hypothetical questions or possibilities." In order to determine whether a claim is ripe, the court examines (1) the likelihood that the harm alleged will ever come to pass; (2) whether the factual record is sufficiently developed to allow for adjudication; and (3) hardship to the parties if judicial review is denied.

For pre-enforcement challenges, a case is ordinarily ripe for review only if the probability of the future event occurring is substantial and of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. The 6<sup>th</sup> Circuit agreed that Norton's "as applied" challenge was not ripe for review.

Assuming that Norton had sufficiently alleged a constitutional harm, she had not established that her alleged harm would ever come to pass. In a meeting with law enforcement, Norton was notified that the government was concerned about a "pattern of activity." However, the agents did not accuse Norton of engaging in a "pattern of activity." Consequently, the court held that Norton had not sufficiently demonstrated that the alleged harm would ever come to pass.

The final assault on § 248 was that it violated the Commerce Clause. The Commerce Clause permits Congress to regulate three categories of conduct: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities that substantially affect interstate commerce. The court concluded

that § 248 fit nicely into the first two categories elucidated above. Consequently, the court focused much of its attention on the third category.

To determine if Congress properly regulated “activities that substantially affect interstate commerce,” the court identified four relevant considerations: (1) the economic nature of the activity; (2) a jurisdictional element limiting the reach of the law to a discrete set of activities that has an explicit connection with, or effect on, interstate commerce; (3) express congressional findings regarding the regulated activity’s effects on interstate commerce; and (4) the link between the regulated activity and interstate commerce.

The Court ruled that after applying this criteria to § 248, the statute was a valid exercise of Congress’s Commerce Clause authority. Consequently, the district court’s dismissal of Norton’s suit was affirmed.

*United States v. Elkins*, 300 F.3d 638 (6<sup>th</sup> Cir. 2002).

In mid-1996, Memphis police received anonymous information that there was a marijuana growing operation at: 155 Scott Street, the building behind 155 Scott, and 1270 Tutwiler Avenue, James Elkins’ home.

The police began surveillance of the Scott Street properties which were divided into two parts with separate doors and addresses. 139 Scott was on one side while 155 Scott was on the other. During surveillance of the building, the police saw James and Carol Elkins come and go. The surveillance team also observed several off-duty Memphis police officers around the properties. On one occasion during the surveillance, the investigators approached James Elkins and spoke with him. Elkins told the surveillance team that he was employing off-duty policeman to safeguard his businesses against burglaries.

The police then turned their attention to the building at 146 Neil Street. Surveillance revealed a pallet stacked with bags of sheep manure fertilizer and numerous cars that stopped at the premises during the night. As a result of their observations, the officers began a more intensive surveillance of the Scott and Neil Street properties as well as the Elkins’ home. The officers used a thermal

imaging device to scan heat emanating from 139 /155 Scott and 146 Neil. This surveillance revealed an unusually high heat output at 146 Neil.

The surveillance officers also confronted an off-duty officer named Smith who was guarding the building on Scott Street. Smith stated that he had worked for James Elkins at both the Scott Street building as well as a building located at 2896 Walnut Grove.

Smith offered to allow the surveillance team to enter the Walnut Grove property but they declined. Instead, a police helicopter flew over the Walnut Grove property and scanned it with an airborne thermal imager. This building also had a high heat signature.

Later that night, the surveillance team went to 2896 Walnut Grove to inspect its exterior. A “no trespassing” sign hung on the building and a PVC pipe protruded from the east wall. There was a gap of approximately 1 inch around the exposed pipe. Bright light emitted from the gap and the surveillance team peered through the gap and saw marijuana leaves inside the building.

The next day, the surveillance team went to Elkins’ home on Tutwiler. The surveillance team informed James Elkins that they had received a complaint about a marijuana grow operation at Scott Street but he denied any involvement in the marijuana growing operation. James Elkins gave the officers permission to search his home.

The officers observed no contraband but did notice a strong and identifiable odor of marijuana in the Elkins’ home. The officers then requested permission to search 155 Scott. James Elkins agreed after saying that the police “could look anywhere they wanted.”

From his house on Tutwiler, Elkins drove one of the officers to 155 Scott Street. However during the trip, Elkins made a call on his cellular phone to an unidentified individual. Moreover, the route taken from the Elkins’ home to Scott Street was circuitous.

The officers found nothing incriminating at 155 Scott. The officers then asked if they could search 139 Scott, the other portion of the building. Elkins verbally agreed to the search and when they emerged

from 155 Scott, the officers observed an unoccupied vehicle recently parked next to the building. The officers recognized the vehicle as Carol Elkins' car, which had been parked at the Elkins' home earlier in the morning. The officers then suspected that the unidentified person to whom James spoke on his cellular phone was his wife, Carol.

James Elkins attempted to unlock the door to 139 Scott, but could not find a matching key. Elkins then called to his wife, who was now inside the building, to open the door. Carol Elkins opened the door and admitted her husband and the officers.

The officers searched 139 Scott and found a cabinet which, when opened, contained metal trays of marijuana. The officers also found plant chemicals, fertilizer, scales, ledger sheets, and other marijuana growing paraphernalia. At one point, the officers turned their attention to the attic of 139 Scott and Elkins pointed out a ladder that the police could use to access that area. The officers found several electric lights in the attic.

During the search, the officers also suspected that there was a hidden compartment between the walls of 139 and 155 Scott. Elkins admitted that there was a secret compartment and identified a spot where the compartment could be accessed without laying waste to the entire wall. In this area, the officers discovered equipment used to grow marijuana.

The officers next asked James Elkins for permission to search 146 Neil. Elkins at first agreed to the search but he then declined and asked to speak with his attorney. Both Carol and James Elkins were handcuffed and taken to the police station at 11:00 A.M.

The surveillance officers then prepared search warrant affidavits for 146 Neil, 2896 Walnut Grove, and 1270 Tutwiler. While the affidavits were being prepared, the surveillance team watched the Walnut Grove property.

At approximately noon, a car containing two Hispanic males parked next to the building. The surveillance team drove toward the two Hispanic males to keep them from entering the building. However, an individual later identified as Morales entered

the building. The officers were able to detain the remaining occupant, Sandoval.

As they detained Sandoval, Morales: exited the Walnut Grove property, saw the officers detaining his colleague, and went back inside and locked the door. The surveillance team then sought advice as to how to secure the building. A state prosecutor advised the officers to enter the building, remove the man inside, and wait for a search warrant.

Consequently, the officers entered 2896 Walnut Grove by forcing open the locked door. Inside the building, the officers found four men including Morales. Moreover, the officers observed an extensive array of marijuana plants and three shotguns. One of the four men informed the officers that two more men were hiding inside. Using a police dog, the officers uncovered a space in the ceiling where two additional men were found.

The search warrant executed on the Walnut Grove property uncovered an extensive marijuana growing operation. At 146 Neil, the officers found numerous plants and weapons. At the Elkins' home, police again discovered a variety of contraband.

James and Carol Elkins were indicted for numerous narcotic offenses as well as money laundering and firearms possession. The Elkins moved to suppress the evidence seized from their property and requested an evidentiary hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), to challenge the search warrant affidavits. The district court conducted a *Franks* hearing after which the court upheld some of the searches but invalidated others.

The court held that the police use of thermal imagers to scan the Elkins' buildings without a search warrant was a violation of the 4<sup>th</sup> Amendment and excluded all thermal imaging evidence. However, the court ruled that James Elkins consented to the searches of 139 and 155 Scott, rendering the evidence seized there, admissible. Next, the court held the warrantless entry into the Walnut Grove property was not justified by exigent circumstances and suppressed evidence found therein.

Finally, pursuant to *Franks*, the district court evaluated the various search warrant

affidavits. The court held that each affidavit contained material misrepresentations and excluded them from consideration. After redacting the affidavits, the court found that the affidavit for 146 Neil established probable cause. However, the court ruled that the redacted affidavits for 2896 Walnut Grove and 1270 Tutwiler were insufficient to establish probable cause and therefore excluded the evidence seized from those two locations.

The Elkins entered conditional guilty pleas to charges involving drugs seized at 139 Scott and 146 Neil. After they were sentenced, both of the Elkins as well as the government appealed the district court's suppression rulings to the 6<sup>th</sup> Circuit.

The first issue considered by the 6<sup>th</sup> Circuit was the district court's conclusion that the use of the thermal imagers, without a search warrant, was unreasonable under the 4<sup>th</sup> Amendment. In *Kyllo v. United States*, 533 U.S. 27 (2001), the Court announced a constitutional rule that "obtaining by sense enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area constitutes a search—at least where the technology in question is not in general public use."

The 6<sup>th</sup> Circuit found that while *Kyllo* broadly protected homes against warrantless thermal imaging, the case *sub judice*, involved the use of a thermal imager to scan the Elkins' commercial buildings.

There is a reasonable expectation of privacy in business premises; however, it is less than the reasonable expectation of privacy enjoyed by the home. The 6<sup>th</sup> Circuit ducked the issue as to whether commercial property can be subject to warrantless thermal imaging. Instead, the court ruled that the searches of the interiors of the buildings were proper, thereby making the evidence seized from those locations admissible for trial. Consequently, the thermal imaging evidence was immaterial to the ultimate issues in the case.

James Elkins challenged the district court's holding that he consented to the search of 139 Scott Street. Elkins maintained that his original consent to search did not pertain the building at 139 Scott.

A search may be conducted without a warrant if a person with a privacy interest in the place to be searched gives free and voluntary consent. A court will determine whether consent is free and voluntary by examining the totality of the circumstances. It is the government's burden, by a preponderance of the evidence, to show through "clear and positive testimony" that valid consent was obtained.

Several factors that should be examined to determine whether consent was valid include: the age, intelligence, and education of the individual giving consent; whether the individual understands the right to refuse to consent; whether the individual understands his or her constitutional rights; the length and nature of detention; and the use of coercive or punishing conduct by the police.

The 6<sup>th</sup> Circuit ruled that the district court did not err in holding that James Elkins was capable of validly consenting to the search. Elkins had an actual privacy interest in the place to be searched because he was the chief commercial tenant of the Scott Street building. The 6<sup>th</sup> Circuit reviewed the circumstances under which Elkins was alleged to have consented to the search and held that the district court did not clearly err in finding that the evidence of free and voluntary consent outweighed the suggestion of coercion. Consequently, the court affirmed the district court's holding on this issue.

Elkins next maintained that the search warrant affidavit for 146 Neil Street, as redacted by the district court after the evidentiary hearing, failed to establish probable cause to search that building. At an evidentiary hearing held pursuant to *Franks* a court can redact statements from the search warrant affidavit that the defendant can prove by a preponderance of the evidence to be both (a) materially false; and (b) made with reckless or intentional disregard for the falsity.

If the redacted affidavit, purged of recklessly and materially false statements no longer establishes probable cause, then the court must find that the resulting search warrant was valid. The 6<sup>th</sup> Circuit reviewed the district court's findings on the *Franks* issue and concluded that the court did not

clearly err in evaluating the information in the search warrant affidavit.

Consequently, the question was reduced to whether the redacted affidavit established probable cause. The 6<sup>th</sup> Circuit ruled that the district court did not err in holding that the redacted affidavit established probable cause for the police to search 146 Neil Street. The redacted affidavit clearly raised a “fair probability that contraband or evidence of the crime of growing marijuana would be found there.”

The government challenged the district court’s decision to suppress evidence taken from the Walnut Grove location. The district court held that the surveillance team violated the Elkins’ expectation of privacy by peering into the hole around the exposed PVC pipe without “sufficient probable cause and exigent circumstances.” Moreover, the district court also held that the warrantless entry to secure the building was unreasonable.

Observations of objects falling into the plain view of an officer who has the right to be in a position to have that view, may be introduced into evidence. The 6<sup>th</sup> Circuit first concluded that the 4<sup>th</sup> Amendment permitted the surveillance team to be in a position where the officers could peer into the opening. The area next to the PVC pipe was accessible to the public. The pipe could be accessed by simply walking down a path that was next to the building and the path was available for public use.

The court acknowledged that there may be circumstances in which the area adjoining a business structure was sufficiently private to enjoy protection analogous to a home’s curtilage. However, the path next to the Walnut Grove structure was, for 4<sup>th</sup> Amendment purposes, a place that police could enter under the “open fields doctrine.” Therefore, the officers were lawfully present next to the PVC pipe and the opening on the Walnut Grove structure.

The next issue considered by the court was the permissibility of the observation. The district court ruled that when the officers looked into the gap around the pipe, they violated the Elkins’ reasonable expectation of privacy in the building’s interior. The 6<sup>th</sup> Circuit ruled that Elkins had a reasonable

expectation of privacy in the interior of his business. However, this expectation of privacy did not insulate that space against a plain view observation. Consequently, the court ruled that the officer’s look through the gap was not a search requiring a warrant.

The court next tackled the issue of whether exigent circumstances existed to justify the officers’ entry into the Walnut Grove property. Exigent circumstances permit a warrantless entry into a structure when evidence of a drug crime is in danger of destruction. To establish that the events observed at Walnut Grove gave rise to exigent circumstances, the government must satisfy the two-part test demonstrating a reasonable belief that: (1) other persons were inside the building; and (2) those persons were likely to destroy evidence of a crime.

In this case, several events contributed to the officers’ conclusion that exigent circumstances existed to justify their warrantless entry into the Walnut Grove property. The evidence suggested that the Elkins’ confederates might know that police were investigating them. The officers saw a car pull up to the Walnut Grove property and Morales entering the building. The detention of Sandoval alerted Morales to the presence of the police.

As long as agents refrain from unreasonably tipping off suspects, they may use normal investigative measures in the vicinity of a suspected crime location without forfeiting their ability to perform a warrantless search to secure evidence if exigent circumstances arise. The court found that the detention of Sandoval reasonably furthered the agent’s need to inquire into the activity inside of 2896 Walnut Grove and to secure the building. Consequently, the court legitimated the search of 2896 Walnut Grove on the exigent circumstances exception to the warrant requirement of the 4<sup>th</sup> Amendment.

The government next carped that the district court erred by holding inadequate, the two affidavits used to procure warrants to search the Elkins’ home on Tutwiler. The 6<sup>th</sup> Circuit found that the uncontested statement that the officers smelled marijuana in the Elkins’ home was an important component of the probable cause determination.

However, the smell of marijuana alone could not justify the issuance of the warrant. Instead, the court ruled that the affidavits set forth probable cause only when the officer's smell of marijuana was combined with the anonymous tip that the Elkins were growing marijuana in their home. Consequently, the 6<sup>th</sup> Circuit ruled that the district court erred by suppressing the contraband found in the Elkins' home on Tutwiler.

The final issue concerned a seizure of cash by the government. Early in the prosecution, the government seized assets controlled by the Elkins and began civil forfeiture proceedings. The Elkins voluntarily waived an adversary due process hearing on the seizure in return for the government's promise to release seized funds in an amount judicially determined to be necessary to pay reasonable attorneys fees.

The Elkinses requested the release of \$350,950 and stated that they needed this amount to hire their counsel of choice. The magistrate analyzed the likely course of the litigation and recommended the release of \$100,000, with the right to review this amount for good cause. The district court affirmed the magistrate's order but increased the amount to \$150,000.

Carol Elkins argued that the district court erred by not releasing the assets in the full amount sought. The Elkins maintained that the choice of a reasonable level of attorney's fees to exempt from civil forfeiture implicated their 6<sup>th</sup> Amendment right to counsel of their choice. The 6<sup>th</sup> Circuit did not decide whether the district court's decision implicated a constitutional right. Instead, the court found that the district court's award of fees was reasonable in light of the issues presented.

*United States v. Cleaves*, 299 F.3d 564 (6<sup>th</sup> Cir. 2002).

Cleaves and seven co-defendants were indicted in a single count indictment charging them with participating in a conspiracy to distribute in excess of five kilograms of cocaine and 100 kilograms of marijuana. Cleaves' trial occurred before *Apprendi v. New Jersey*, 530 U.S. 466 (2000) was decided and the jury was not instructed to render a verdict about either the type or quantity of the

drug that was the object of the charged conspiracy.

At sentencing, the district court found that the record "plainly" sustained a conspiracy to distribute between 5 and 15 kilograms of cocaine and imposed a life sentence. A life sentence was imposed based on a statutory enhancement that was triggered by Cleaves' numerous felony drug convictions.

While this appeal was pending *Apprendi* was decided. Consequently, on appeal, Cleaves argued that after *Apprendi*, he was subject to a sentence of no more than ten years imprisonment because this was the maximum penalty that could be imposed on those convicted of a conspiracy involving an unspecified quantity of marijuana.

The government argued that the district court did not err in finding that Cleaves was liable for a conspiracy to distribute cocaine. However, the government conceded that the case must be remanded for resentencing or retrial on the length of the sentence to be imposed because the jury did not make a specific finding on the drug quantity involved in the conspiracy.

Because Cleaves did not object to the jury instruction that produced a general verdict in his trial, the 6<sup>th</sup> Circuit reviewed his claim for plain error. Plain error review is narrow in scope, requiring: (1) a finding of error; (2) that is plain; and (3) that affects the defendant's substantial rights. Even if all three of these factors are present, the court will reverse only if it "seriously affects the fairness, integrity, or public reputation of the judicial proceedings."

In *United States v. Dale*, 178 F.3d 429 (6<sup>th</sup> Cir. 1999), the court held that when a conspiracy count alleges more than one substantive offense and the verdict is general rather than specific, the defendant may not be sentenced to more than the maximum sentence for the offense with a shorter statutory maximum. However, in case *sub judice*, the district court's decision to forego a special verdict resulted from the court's recognition that, given the amount of marijuana and cocaine alleged in the indictment, conviction of conspiracy related to either drug carried the same statutory maximum.



Accordingly, with the consent of both the prosecutor and the defendant, the district court held that a jury determination of the specific drug involved in the conspiracy was unnecessary. If the district court confronted this issue after the *Apprendi* decision was announced, it would have found that because the statutory maximum penalty for undetermined amounts of marijuana and cocaine differed dramatically, the jury should have been directed to make a specific finding concerning the drug involved in the offense.

For marijuana, 21 U.S.C. § 841(b)(1)(D) limits a sentence for an unknown quantity of marijuana to ten years while 21 U.S.C. § 841(b)(1)(C) limits a sentence for an unknown quantity of cocaine to 30 years. The 6<sup>th</sup> Circuit ruled that under *Apprendi*, the failure to instruct the jury to determine both the type of drug and the drug quantity involved in the conspiracy amounted to plain error.

However, the court ruled that this error did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. The court arrived at this conclusion because the evidence that Cleaves was involved in a conspiracy to distribute cocaine was overwhelming. Consequently, the court found that no rational jury could have found that Cleaves was involved in a conspiracy to distribute marijuana rather than cocaine.

However, in contrast with the district court's determination of the drug type, the 6<sup>th</sup> Circuit concluded that the district court's determination of the drug amount was plain error requiring resentencing. The testimony concerning the amount of cocaine involved in the conspiracy was highly speculative. Consequently, a jury could have dismissed some testimony and returned a guilty verdict with a significantly lesser amount of cocaine enumerated in a special verdict form. Consequently, the 6<sup>th</sup> Circuit affirmed Cleaves' conspiracy conviction but remanded the case for resentencing.

*Lyons v. Jackson*, 299 F.3d 588 (6<sup>th</sup> Cir. 2002).

In 1990, Lyons was 16 years old, had a 7<sup>th</sup> grade education, and he pled guilty in Michigan state court to first degree murder.

The primary reason for his guilty plea was based on his counsel's belief that if he pled guilty, a juvenile sentence would be imposed. A juvenile sentence would only subject Lyons to incarceration until the age of 21, whereas, if he was sentenced as an adult for first degree murder, the trial court would be obligated to impose a sentence of life imprisonment without the possibility of parole.

The trial court imposed a juvenile sentence but the state appealed. The Michigan Court of Appeals reversed and the trial court imposed a life sentence without any possibility of parole. Lyons' trial counsel did not either consider or advise Lyons that the state could appeal the imposition of a juvenile sentence.

Lyons was unsuccessful in his quest in the state court system to either set aside his guilty plea or to have his representation declared ineffective. Consequently, Lyons filed a § 2254 petition. The district court concluded that the failure of Lyons' counsel to inform him of the state's right to appeal constituted ineffective assistance of counsel. Accordingly, the district court granted Lyons habeas relief and the Warden appealed to the 6<sup>th</sup> Circuit.

The 6<sup>th</sup> Circuit evaluated the state court's decision on this issue by applying the "unreasonable application" prong of § 2254. Under the § 2254 regime, an application for a writ of habeas corpus filed on behalf of a person in custody pursuant to a judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim -- (1) resulted in a decision that was "contrary to," or (2) involved an "unreasonable application of," clearly established Federal law as determined by the Supreme Court of the United States.

"Clearly established Federal law as determined by the Supreme Court" refers to the Supreme Court's holdings, as opposed to *dicta*, that existed at the time of the relevant state court decision. Moreover, a state court decision "unreasonably applies" Supreme Court precedent by either: (1) identifying the correct governing legal rule from Supreme Court precedent but unreasonably applying it to the facts; or (2) unreasonably extending a

legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refusing to extend that principle to a new context where it should apply. Finally, the application of law must be “objectively unreasonable” and not merely incorrect or erroneous.

The 6<sup>th</sup> Circuit concluded that *Hill v. Lockhart*, 474 U.S. 52 (1985) and *Strickland v. Washington*, 466 U.S. 668 (1984) set forth the law applicable to an ineffective assistance of counsel claim as advanced by Lyons. Consequently, both *Hill* and *Strickland* were “clearly established Federal law as determined by the Supreme Court” at the time that Lyons’ case was considered.

Under *Strickland*, a defendant claiming ineffective assistance of counsel must show both deficient performance by counsel and prejudice to the defendant resulting from that deficient performance. To be deficient, counsel’s performance must fall below an objective standard of reasonableness. However, in *Hill*, which applied *Strickland* to the guilty plea context, the Court explained that a defendant demonstrates prejudice by showing “a reasonable probability that, but for counsel’s errors, the defendant would not have pleaded guilty and would have insisted on going to trial.”

On appeal, the Warden maintained that counsel’s failure to inform Lyons of the prosecution’s right to appeal the imposition of a juvenile sentence did not constitute ineffective assistance of counsel because the prosecutor’s right of appeal represented a collateral, as opposed to a direct consequence of the plea.

The 6<sup>th</sup> Circuit rejected this argument for two reasons. First, the Warden relied on circuit court cases to formulate this argument. The AEDPA prohibits use of lower court decisions in determining whether the state court decision was “contrary to” or “an unreasonable application of clearly established Federal law.” Second, the 6<sup>th</sup> Circuit held that the Warden’s argument was contrary to relevant Supreme Court case law. The Supreme Court does not use a direct/collateral consequence categorization scheme to decide ineffective assistance of counsel claims.

Consequently, the 6<sup>th</sup> Circuit’s task was to determine whether the state court reasonably applied *Hill* and *Strickland* to hold that: (1) Lyons’ trial counsel provided objectively reasonable assistance; and (2) even if Lyons had been advised of the prosecutors’ right to appeal, he still would have pled guilty.

The court concluded that Lyons’ trial counsel imparted his knowledge of the trial court’s sentencing practice. Moreover, Lyons initially benefitted from counsel’s knowledge because the trial court imposed a sentence under juvenile law. Furthermore, the court even concluded that counsel informed Lyons of the risks as they related to the trial court’s sentencing determination. Without question, Lyons understood that if he pled guilty, the trial court could opt to impose either a severe adult sentence of life imprisonment or a lenient juvenile sentence.

However, with all that said, the court ruled that Lyons’ counsel acted incompetently by failing to consider the likelihood that the prosecutor would exercise his right to appeal the district court’s imposition of a juvenile sentence. Any juvenile sentence imposed on Lyons would result in him serving less than five years in a juvenile facility. Given such a lenient sentence for first degree murder, it was unreasonable for counsel not to have considered that the prosecutor would appeal and the juvenile sentence could be reversed.

In sum, the court ruled that failing to consider, let alone notify the client of a factor that could negate the entire benefit of the guilty plea was not within the range of professional norms. Consequently, the court held that Lyons’ trial counsel was incompetent and it was an objectively unreasonable application of *Hill* and *Strickland* for the Michigan Court of Appeals to hold otherwise.

The 6<sup>th</sup> Circuit next considered the prejudice prong of the *Strickland* analysis. In order to determine whether Lyons was prejudiced by his counsel’s deficient performance, the court was concerned about whether there was a reasonable probability that had he been advised of the prosecutor’s right to appeal, he would not have pled guilty. A reasonable probability is a probability sufficient to undermine confidence in the outcome; it is less than a preponderance of the

evidence.

The Warden argued that Lyons could not have been prejudiced by any deficiency on the part of his trial counsel because Lyons acknowledged at the plea hearing that he could receive an adult sentence of life imprisonment without parole. According to the Warden, if a defendant is aware of the maximum possible sentence, he cannot be prejudiced by his counsel's failure to inform him of the prosecutor's right to appeal.

The 6<sup>th</sup> Circuit rejected this argument and concluded that an awareness of the sentencing range available to the trial judge is not the same as an informed understanding that a sentencing judge's decision is subject to reversal. The rule suggested by the Warden would preclude courts from finding prejudice in any situation where the defendant knew the range of penalties to which he was subject.

The 6<sup>th</sup> Circuit ruled that counsel's failure to assess all of the risks and to inform Lyons of the risks, including the prosecutor's right to appeal the sentence, left Lyons to make the most important decision of his life without essential information. Presented with all the risks, Lyons might well have decided to plead not guilty and take his chances at trial. The court considered the evidence and found that Lyons presented sufficient evidence to show a reasonable probability that he would not have pled guilty had his counsel's performance been objectively reasonable.

Consequently, the 6<sup>th</sup> Circuit ruled that the Michigan Court of Appeals' decision finding that Lyons did not satisfy the prejudice prong was also objectively unreasonable. As a result, the 6<sup>th</sup> Circuit affirmed the district court's conditional grant of habeas relief.

**Miller v. Straub**, 299 F.3d 570 (6<sup>th</sup> Cir. 2002).

In 1990, Miller and Haynes were 15 and 16 years old, respectively. On the advice of their defense counsel, both Miller and Haynes pled guilty in Michigan state court to first degree murder. The primary reason that the two boys pled guilty was that their attorneys' believed that the trial court would impose juvenile sentences if guilty pleas were entered.

The trial court did sentence both boys as juveniles which meant that they would be

incarcerated in a juvenile facility until they were 21 years old. However, in each case, the prosecution appealed and the Michigan Court of Appeals reversed. Consequently, on remand, Miller and Haynes received the only available adult sentence under Michigan law for a first degree murder conviction: life in prison without the possibility of parole.

Neither Miller's nor Haynes' trial counsel considered or advised their respective clients that the prosecutor could appeal the imposition of a juvenile sentence. [If you have been awake for the last five minutes, these facts should sound somewhat familiar.]

Both Miller and Haynes were unsuccessful in their quests in the state court system to either set aside their guilty pleas or to have their representation declared ineffective. Consequently, both Miller and Haynes filed § 2254 petitions.

The district court concluded that the failure of defense counsel to inform Miller and Haynes of the prosecutor's right to appeal constituted ineffective assistance of counsel. The Warden then appealed to the 6<sup>th</sup> Circuit.

The homicides that occurred in these two cases were different from the one discussed in *Lyons v. Jackson*, *supra*. Nonetheless, the 6<sup>th</sup> Circuit utilized the same method of analysis employed in *Lyons* and concluded that counsels' failure to apprise their clients of the prosecutors' right to appeal the imposition of a juvenile sentence was objectively unreasonable and both clients were prejudiced by their counsels' performance. Consequently, the 6<sup>th</sup> Circuit affirmed the grant of habeas relief to both men.

**Sawyer v. Hoftbauer**, 299 F.3d 605 (6<sup>th</sup> Cir. 2002).

In 1991, 14 year old Lucas Lundberg was kidnaped near his home in Ingram County, Michigan and forced to engage in oral sex by a stranger who subsequently released him. Approximately, two months later, 18 year old Sandra Miller was kidnaped near her home in Hillsdale County, Michigan and she too was also forced to engage in oral sex by a stranger who subsequently released her. During the second incident, the stranger made Miller take off her clothes and underwear which he returned before releasing her.

Thirteen months later, Sawyer was

indicted in both counties and in separate indictments for a variety of violations of Michigan law pertaining to his involvement in these two crimes. At the trial in the Miller assault, a Michigan State Police scientist testified that she discovered traces of semen on Miller's underwear but that the lead investigator had instructed her that additional analysis of the stain would be unnecessary. Instead, the investigator maintained that the trace evidence was deposited by Miller's boyfriend.

Separate juries convicted Sawyer of his participation in these two events and the Michigan Court of Appeals affirmed his convictions. While they were litigating direct appeals of these two incidents, defense counsel discovered that the state suppressed exculpatory evidence in the Miller assault trial. In FOIA litigation that occurred two years after Sawyer's trial, it was discovered that the police tested the semen stain against Sawyer's blood type and obtained a negative result. Consequently Sawyer then filed a motion for reconsideration based on the violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

When the state court rejected this argument, Sawyer filed a § 2254 petition challenging his convictions and sentence in the incident involving Miller. The court dismissed Sawyer's petition and refused to conduct an evidentiary hearing. Instead, the court issued a certificate of appealability on the issue of whether "the lack of a full and fair adjudication in relation to factual issues concerning the semen stain in the state court precluded application of the standards of deference arising under the AEDPA."

Sawyer also filed a § 2254 petition challenging his conviction in the Lundberg assault. The district court dismissed this petition and granted a certificate of appealability only with respect to Sawyer's claim under *Brady*. The 6<sup>th</sup> Circuit consolidated both appeals and issued this opinion.

Because Sawyer filed his habeas petitions after the enactment of the AEDPA, both cases were governed by that regime. Sawyer's claim for habeas relief in the Miller incident relied chiefly on the existence of a

semen stain found on Miller's underwear. Sawyer maintained that this evidence was relevant because Miller performed fellatio on the perpetrator after which he handled her panties while the victim was blindfolded.

Sawyer maintained that the district court should have conducted an evidentiary hearing on the negative result of the semen stain because the state courts failed to accord him a "full and fair hearing" on the issue. The 6<sup>th</sup> Circuit held that the district court always has the inherent authority in habeas cases to order evidentiary hearings to settle disputed issues of material fact.

However, by enacting the AEDPA, Congress placed restrictions on this discretion to hold an evidentiary hearing. A petitioner who fails to develop the factual basis of a claim in state court proceedings is not entitled to a federal evidentiary hearing unless he meets certain stringent requirements.

The failure to develop a factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel. A finding of diligence would depend upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court.

Sawyer maintained that he first learned about the existence of the semen stain on Miller's underwear from a police report that was delivered to his defense counsel one or two days before trial. When the issue was brought before the trial court, the prosecutor indicated that the police had instructed its laboratory scientist not to test the sample because it had been left by Miller's boyfriend.

However, while Miller's conviction was on direct appeal, defense counsel learned about the negative test result pursuant to a FOIA request. Defense counsel then filed a motion for reconsideration of their recently discovered *Brady* violation as an issue on appeal. When the state court rejected this argument, Sawyer filed a habeas action in district court. Consequently, the 6<sup>th</sup> Circuit concluded that the AEDPA's standard for evidentiary hearing did not apply in this case because Sawyer was diligent in pursuing his *Brady* claim in the Michigan courts.

The 6<sup>th</sup> Circuit then framed the question to be whether the district court abused its discretion by denying Sawyer an evidentiary hearing in federal court. The basis for Sawyer's habeas petition was that the state violated the mandate of *Brady* requiring the prosecution to provide evidence that was both favorable to the defendant and material to his guilt or innocence.

Favorable evidence is material "if there is a reasonable probability, that had the evidence been disclosed to the defense, the result of the proceeding would have been different." Consequently, the relevant question was whether "Sawyer, in the absence of material evidence, received a fair trial, understood as a trial resulting in a verdict worthy of confidence."

The 6<sup>th</sup> Circuit concluded that the undisclosed negative result of the test on the semen stain was exculpatory if Sawyer could establish that the perpetrator of the crime for which he was convicted was the source of the semen on Miller's underwear. The court found that the existence of a semen stain on Miller's underwear from a source other than Sawyer would have been favorable to him.

The court acknowledged that although the allegation at trial was that the sole act of sexual penetration was one of fellatio, the perpetrator could have wiped, or cleaned himself with Miller's underwear before handing it back to Miller. As a result, the negative test result, which was exculpatory, was material to Sawyer's guilt or innocence.

The court proceeded to review the merits of Sawyer's *Brady* claim because the fact that Sawyer was not the source of the semen stain on Miller's underwear was beyond dispute. It was irrelevant whether that or other evidence was unfavorable to someone other than the defendant. The alleged *Brady* violation in this case involved the suppression of the negative test result, which was clearly established by the record and which an evidentiary hearing would only confirm.

The 6<sup>th</sup> Circuit reviewed how the Michigan Appellate Court evaluated Sawyer's *Brady* claim. The state court did not address the fact that the police had tested the semen stain against Sawyer's blood type, obtained a negative result, and then suppressed the

evidence.

Consequently, the 6<sup>th</sup> Circuit ruled that the Michigan Appellate Court's analysis and complete failure to identify the evidence that was suppressed as *Brady* material was an "unreasonable application of" *Brady* and therefore the district court's denial of habeas relief to Sawyer in the Miller assault was reversed.

The court next reviewed Sawyer's habeas claim in the Lundberg assault. Sawyer sought habeas relief in this incident based on the same *Brady* violation that occurred in the Miller assault. However, the two cases were prosecuted: in different counties; in different trials and by different prosecutors. The 6<sup>th</sup> Circuit found that there was no reasonable probability that the disclosure of a negative test result in the Miller assault would have changed the result of Sawyer's trial for the Lundberg assault. Consequently, Sawyer's conviction in the Lundberg assault was affirmed.

**Hill v. Anderson**, 300 F.3d 679 (6<sup>th</sup> Cir. 2002).

Hill was convicted under Ohio law of capital murder in 1985. At a mitigation hearing, a defense expert witness testified that Hill had an IQ below 70, had been raised in a poor environment, and was a "follower." After weighing mitigating factors, a three judge panel sentenced Hill to death despite his mental retardation.

Throughout his appeals, Hill argued that he was mentally retarded and that his retardation prevented him from receiving a fair trial. After he was denied habeas relief by the district court, Hill advocated for the first time before the 6<sup>th</sup> Circuit that executing the mentally retarded violated the 8<sup>th</sup> Amendment's ban on cruel and unusual punishment. However, Hill did not present this argument to the Ohio courts.

In *Atkins v. Virginia*, 122 S. Ct. 2242 (2002) the Supreme Court ruled that executing a mentally retarded individual violated the 8<sup>th</sup> Amendment's ban on cruel and unusual punishment. The 6<sup>th</sup> Circuit held that the *Atkins* decision would be retroactively applied to Hill's case. The court arrived at this conclusion because the Supreme Court had previously recognized that a constitutional

rule barring the execution of the retarded would fall outside of the ban on retroactive application of new constitutional rules because it placed the ability to execute the retarded “beyond the state’s power.”

Although *Atkins* barred the execution of the mentally retarded, it did not set forth a procedure for determining whether an individual is sufficiently retarded to escape execution. Instead *Atkins* left it to the states to develop “appropriate ways to enforce the constitutional restrictions” on executing the mentally retarded.

In this case, the State of Ohio did not formally concede that Hill was retarded. Although there was voluminous expert testimony supporting this conclusion and some Ohio appellate courts even adopted this conclusion, Hill’s retardation claim was neither exhausted nor conceded. As a result, the 6<sup>th</sup> Circuit ruled that Ohio should have the opportunity to develop some procedures for determining whether Hill was retarded and ineligible for death.

Because Hill’s 8<sup>th</sup> Amendment mental retardation issue was raised for the first time in a federal habeas petition, he filed a “mixed” petition. Under the AEDPA, a federal habeas court may not grant a petition containing unexhausted claims except in a narrow range of special circumstances, not present here, or unless the state explicitly waived the exhaustion requirement, which it did not do. Consequently, the 6<sup>th</sup> Circuit remanded Hill’s case to the district court with instructions to dismiss his *Atkins* claim so that it could be considered by a state court.

***United States v. Haynes***, 301 F.3d 669 (6<sup>th</sup> Cir. 2002).

In the latter part of September 1998, Sergeant George received information from authorities in Illinois that Haynes was wanted for a series burglaries and a parole violation. The items that Haynes was alleged to have stolen included firearms and jewelry. Sergeant George was also informed that Haynes was armed and dangerous and had told his attorney that he would not be taken alive.

After receiving information that lead him to believe that Haynes was staying at Janice Justis’ apartment, Sergeant George

contacted the housing manager. Sergeant George was told that a person fitting Haynes’ description had pulled in front of Justis’ apartment in a gray Firebird.

Sergeant George then summoned four officers to check the apartment. While approaching the apartment, Sergeant George heard Lieutenant Kelly’s voice coming from inside of the apartment. Upon entering the apartment, Sergeant George saw Ms. Justis, Lieutenant Kelly, and Captain Vastbinder.

Sergeant George testified at a suppression hearing that he was in the bedroom of the apartment when Haynes was discovered hiding behind a mattress. According to Sergeant George, Haynes was handcuffed while in the bedroom. When asked whether Haynes was patted down at the time, Sergeant George replied “I would think so.” There was some dispute as to whether any of the officers took car keys from Haynes’ pocket and searched the Firebird.

When Haynes was taken from Justis’ apartment, Sergeant George remained in the bedroom. About ten minutes later, Sergeant George was informed that Haynes had given consent to search his vehicle. Sergeant George denied any knowledge of an officer entering Haynes’ car until he was taken outside and given his oral consent.

Patrolman Carr denied that Haynes was patted down when he was in the bedroom. Instead, Patrolman Carr stated that he and Patrolman Lemons took Haynes directly outside. Upon leaving the apartment, Patrolman Carr stated that Haynes was patted down at which time car keys were removed from his pocket.

According to Patrolman Carr, after he discovered that Haynes had keys on his person, he asked Haynes whether the gray Firebird was his. Haynes replied that the car was his, but that it was registered to his daughter. Moreover, Haynes informed Patrolman Carr that he had purchased the vehicle and anything in it was his. Patrolman Carr believed that Haynes consented to the search of the vehicle at which time Carr used the key to open the Firebird.

However, Patrolman Carr acknowledged that Haynes was reluctant to consent to the search because “he just didn’t

want to get his daughter in trouble.” A search of the vehicle yielded a .357 magnum on the floor board.

At a suppression hearing, Haynes testified that he did not consent to the search of the vehicle. When a written consent form was presented to him to sign, Haynes declined. Moreover, Haynes called witnesses that testified consistently with Haynes’ recollection of the events.

Eventually, Haynes was taken to the police station where he was informed of his *Miranda* rights and he executed a waiver. In a recorded statement that followed, Haynes admitted ownership of the .357 magnum.

At the suppression hearing, Haynes testified that before the tape recording started, Sergeant George threatened to involve his daughter and Ms. Justis if Haynes did not give a statement. Sergeant George denied using any threats or coercive tactics to compel Haynes to give a statement. Moreover, Patrolman Lemons corroborated Sergeant George’s testimony.

The district court denied Haynes’ motion to suppress physical evidence and statements but conceded that “somebody went into the car while Haynes was still in the house.” Nonetheless, the district court concluded that because Haynes later gave verbal consent to the search, that consent would vitiate the bad search that had previously taken place. Ultimately, the district court concluded that Haynes did give consent but only after acknowledging that “finding the truth in this one is sort of like trying to catch moonbeams in a jar because there are so many different accounts of what happened.”

Haynes entered a conditional guilty plea and after sentence was imposed, he timely appealed to the 6<sup>th</sup> Circuit. The first issue considered by the court was whether exigent circumstances existed to support the search of Haynes’ Firebird.

The district court agreed with the government that exigent circumstances justified the search. The Supreme Court has identified the mobility of automobiles as creating an exigent circumstance to justify a warrantless search. If a car is readily mobile and probable cause exists to believe that it contains contraband, the 4<sup>th</sup> Amendment

permits the police to search the vehicle without procuring a search warrant.

Moreover, the search of an automobile may be conducted without a warrant even if it is not readily mobile. “Even in cases where an automobile was not immediately mobile, the lesser expectation of privacy resulting from its use as a readily mobile vehicle justified application of the vehicle exception.”

Consequently, the 6<sup>th</sup> Circuit rejected Haynes’ argument that the officers should have secured a search warrant before searching the car. Haynes’ vehicle was readily mobile and even though Haynes was in custody, it could have been driven away by someone else.

After arriving at this conclusion, the court crystalized the issue to be whether the initial search of Haynes’ car was supported by probable cause. Probable cause is defined as “reasonable grounds for belief, supported by less than *prima facie* proof of mere suspicion.” Probable cause exists when there is a fair probability that contraband or evidence of a crime will be found in a particular place.

The 6<sup>th</sup> Circuit concluded, after looking at the objective facts known to the officers at the time of the search, that a fair probability that contraband would be found in the car did not exist. Sergeant George had been informed that Haynes was suspected of stealing firearms and jewelry, but none of the officers had been given any information that would lead to any more than a mere suspicion that Haynes stored those articles in his car.

Haynes was not arrested at or near his car and there was no testimony at the suppression hearing from which the police could adduce a fair probability that a search of the Firebird would reveal contraband or evidence of criminal activity. Consequently, the 6<sup>th</sup> Circuit ruled that the police lacked probable cause to search the Firebird without Haynes’ consent.

The court next considered whether consent existed to justify the warrantless search of the Firebird. The government bears the burden, by a preponderance of the evidence, to show through clear and positive testimony that consent was obtained.

The 6<sup>th</sup> Circuit concluded that the

district court clearly erred in crediting the officers' testimony that Haynes verbally consented to the second search of the Firebird. The district court's reasons for sorting out the contradictory testimony of the officers and Haynes and his witnesses were insufficient to overcome the lack of clarity in the government's presentation of evidence.

The 6<sup>th</sup> Circuit found that the district court's statement that "the truth in this one is like catching moonbeams in a jar," was indicative of the government's failure to demonstrate clear and positive testimony that Haynes consented to the search of the Firebird.

The next question addressed was even if Haynes did consent to the second search, whether that consent would vitiate the taint of the first, and unquestionably illegal, search of Haynes' car. To determine whether the taint of the illegal search was removed by Haynes' alleged consent, the 6<sup>th</sup> Circuit applied the "independent source" doctrine.

The "independent source doctrine" deems evidence admissible in those situations where an illegal search takes place at some point during a criminal investigation, but where a proper, independent search lead to the evidence in question." The doctrine rests "upon a policy that, while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied. Dissipation of the taint resulting from an illegal entry ordinarily involves showing that there was some significant intervening time, space, or event."

In this case, virtually no time elapsed between the first and second search of the car and the parties involved never left the scene during that time period. Hence, the only remaining question was whether an intervening event dissipated the taint.

The district court ruled that Haynes consented to the search of his car. Under some circumstances, voluntary consent to a search is an event that may remove the taint of a prior illegal search. However, the court held that the facts did not demonstrate, by clear and positive testimony, that Haynes' alleged consent, if given, was sufficiently voluntary so as to remove the taint of the prior illegal

search of his vehicle.

Prior to his alleged consent, Haynes had not been advised either that he could refuse to consent to the search or of his *Miranda* rights. Even though Haynes was not a "newcomer to the law," given the rapid succession of events from the time that Haynes was discovered in his hiding place to the time that Patrolman Carr told him that the officers "needed to check the car," the 6<sup>th</sup> Circuit was not convinced that Haynes' acquiescence represented "unequivocal, specific, and intelligently given consent."

Finally, the 6<sup>th</sup> Circuit considered the propriety of the district court's decision denying Haynes' motion to suppress the statements that he gave following his arrest. Haynes argued that the statements that he gave to Sergeant George following his arrest should be suppressed because they were coerced.

An admission is coerced when the conduct of law enforcement officers is such as to overbear the will of the accused to resist. In determining whether a confession has been elicited by means that are unconstitutional, a court looks to the totality of the circumstances concerning whether a defendant's will was overborne in a particular case.

Factors to consider in assessing the totality of the circumstances include the age, education, and intelligence of the accused; whether the accused was informed of his constitutional rights; the length of questioning; the repeated and prolonged nature of the questioning; and the use of physical punishment such as the deprivation of food or sleep

The 6<sup>th</sup> Circuit evaluated these factors and concluded that they did not weigh in Haynes' favor. As such, the 6<sup>th</sup> Circuit affirmed the denial of Haynes' motion to suppress his statements but reversed the district's court denial of his motion to suppress physical evidence.

***Hargrove v. Brigano***, 300 F.3d 717 (6<sup>th</sup> Cir. 2002).

On January 28, 2000, Hargrove filed a § 2254 petition asserting that there was insufficient evidence to sustain his burglary conviction. The Warden filed a motion to dismiss asserting that Hargrove's claim was



not exhausted. The district court agreed that the petition contained unexhausted claims and should be dismissed because Hargrove had not filed an appeal to the Ohio Supreme Court; but instead, he filed a motion for delayed appeal.

Consequently, the district court dismissed Hargrove's petition without prejudice and it prospectively tolled the one year statute of limitations found in 28 U.S.C. § 2244(d)(1) effective January 28, 2000. The district court tolled the statute on the condition that Hargrove would pursue a state remedy within 30 days of the issuance of the court's order and return to federal court within 30 days of exhausting his state remedies.

The Warden appealed and argued that the district court's dismissal was proper because Hargrove's petition contained an unexhausted claim. However, the Warden took issue with the district court's decision to prospectively toll the one year statute of limitations. The Warden argued that the district court's order was an advisory opinion because it addressed issues that were not raised by the parties.

Consequently, the issue presented on appeal was whether the district court erred by prospectively tolling the statute of limitations found in § 2244(d)(1). The Warden argued that the district court exceeded its authority by ordering equitable tolling. Hargrove responded that although the 6<sup>th</sup> Circuit had previously held that equitable tolling may be applied in cases where the petition was not timely filed, it was within the jurisdiction of the district court that received a timely petition to determine whether the statute of limitation period should be equitably tolled.

The 6<sup>th</sup> Circuit recognized that almost all courts addressing this issue have been asked to equitably toll the statute of limitations period for untimely petitions but not to prospectively toll the period at the time the courts were dismissing timely petitions. Although the decision to toll the statute of limitations would normally be made by the district court that receives an untimely petition, the 6<sup>th</sup> Circuit ruled that the district court's action of prospectively tolling the statute of limitations was reasonable. Consequently, the 6<sup>th</sup> Circuit affirmed the

decision of the district court to prospectively toll § 2244(d)(1)'s one year limitations period.

*United States v. Miggins*, 302 F.3d 384 (6<sup>th</sup> Cir. 2002).

On December 2, 1999, the Nashville Police Department made a controlled delivery of a Federal Express package containing more than one kilogram of cocaine to the residence of Charles Moore. Donald Miggins and Edward McDaniels met the police officer posing as the Federal Express driver outside of Moore's residence. After Miggins, McDaniels, and Derek Watson left with the package, the Nashville Police searched Moore's residence pursuant to an anticipatory search warrant where they seized a firearm.

Moore was arrested when he arrived home and he admitted that the firearm belonged to him. A Nashville police officer arrested Miggins, McDaniels, and Watson shortly after they left with the package containing the cocaine. A search of McDaniels' residence pursuant also yielded firearms and cocaine.

Miggins, McDaniels, and Watson were charged in an indictment alleging a variety of federal firearms, weapons and narcotics violations. The district court granted Moore's motion to sever and he was tried separately from Miggins, McDaniels and Watson.

Before trial, McDaniels filed a motion to suppress the evidence seized from the apartment that he shared with Miggins. At a suppression hearing, Officer Adams, the affiant on the search warrant, testified that he was notified by Deputy Wegener of the Los Angeles County Sheriff's Department that a Federal Express package containing cocaine was being sent to Nashville from California. When the package arrived in Nashville, a narcotics dog detected the presence of a controlled substance. After the package was opened, the police discovered the cocaine.

When the controlled delivery to the address listed occurred, Miggins, McDaniels and Watson greeted the Federal Express van. After Miggins signed for the package, the three men departed in a vehicle, but were soon stopped and arrested. The police found out that Miggins and McDaniels lived together in an apartment in Nashville. Officer Adams also learned that Watson and Miggins were tied to

the South Central Los Angeles area and Miggins and Watson were members of a gang based in Los Angeles.

Deputy Wegener informed Officer Adams that Miggins had previously been convicted of numerous cocaine charges. Based on the information, Officer Adams secured a search warrant for the residence of Miggins and McDaniels. At the residence, 3.7 grams of crack and three firearms were seized.

The district court denied McDaniels' suppression motion after finding that while Officer Adams did not have probable cause for the search of the apartment, the search was nonetheless valid under the "good faith exception" elucidated in *United States v. Leon*, 468 U.S. 897 (1984).

At Miggins,' McDaniels,' and Watson's trial, Officer Adams testified that following their arrest, Miggins was found with a piece of paper in his pocket with information listing "Darnel Smith" as the sender and "Keith Jackson" as the recipient, as well as the name, "Tommy Lee." When he signed for the package, Miggins used the name "Darnel Smith." During the search of McDaniels' and Miggins' apartment, police found an airline ticket in Miggins' name showing a flight from Los Angeles to Nashville as well as a Western Union receipt for a money transfer listing the sender as "Darnel Smith" and the recipient as "Keith Jackson."

Miggins and McDaniels were convicted of all charges while Watson was acquitted. Both Miggins and McDaniels appealed their convictions.

Moore filed a motion to suppress the physical evidence found during the execution of an anticipatory search warrant at his residence and the statements that he made to Officer Adams after the anticipatory search warrant was executed.

At Moore's motions hearing, Officer Adams testified that the officers anticipated that the defendants would retreat inside the residence once the package was delivered. However, the defendants did not go back into the residence with the package; instead they immediately left the premises in a vehicle. However, prior to the delivery, officers observed the three men going into and out of the house.

After the delivery of the package, the police executed the anticipatory search warrant and found a firearm in Moore's residence. While the search was in progress, Moore returned to his residence and was arrested. Before questioning Moore about the package that was delivered to his residence, Officer Adams advised Moore of his *Miranda* rights. Moore acknowledged that he understood his rights and Officer Adams testified that Moore was not forced to answer any questions.

The district court found that there was probable cause for an anticipatory search warrant and that the triggering event to justify the execution of the warrant had occurred. The district court credited the officer's testimony that Miggins, McDaniels and Watson "went into and out of the residence" as more credible than Watson's testimony that "none of the three individuals entered the residence prior to the issuance of the search warrant." The district court also found that even if the triggering event for the anticipatory search warrant was not met, the search was proper under the *Leon* good faith exception.

Finally, the district court denied Moore's motion to suppress his inculpatory statements after finding that it was undisputed that Moore received his *Miranda* rights and that he knowingly, intelligently and voluntarily waived those rights.

Because Moore was charged with being a felon in possession of a firearm, his trial was severed from that of his co-defendants. At Moore's trial, he stipulated that he was a convicted felon. Officer Adams testified that during the search of Moore's residence, he found a pistol underneath the bottom drawer of a dresser in the bedroom.

Officer Adams also testified that when he questioned Moore about the pistol, Moore first told him that the pistol was for his protection, but then claimed that it belonged to his brother. Finally, the government established that the pistol had traveled in interstate commerce. Needless to say, the jury quickly convicted Moore.

The first issue considered by the 6<sup>th</sup> Circuit in this consolidated appeal was whether the district court erred in applying a two level increase to Miggins' offense level

pursuant to USSG § 2D1.1(b)(1) for his possession of a firearm. To enhance a sentence for firearm possession, the government must show, by a preponderance of the evidence, that the defendant possessed the firearm during a drug trafficking offense.

Once the government satisfies its burden, “a presumption arises that such possession was connected to the offense.” Possession may be actual or constructive but to establish constructive possession, the government must show that the defendant had ownership, dominion, or control over the firearm or dominion or control over the premises where the firearm was located.

If the government satisfies its initial burden of showing that the defendant was in possession of the weapon during the offense, then the burden shifts to the defendant to demonstrate that it was clearly improbable that the weapon was connected to the offense. If the defendant fails to make such a showing, then the enhancement under § 2D1.1(b)(1) is appropriate.

Miggins was acquitted of possessing two firearms in furtherance of a drug trafficking crime. However, Miggins was found guilty of being a felon in possession of a firearm. Notwithstanding the jury’s verdict of acquittal on the § 924(c) charges, the district court was not prevented from considering conduct underlying the charges for which Miggins was acquitted, so long as that conduct was proven by a preponderance of the evidence.

The 6<sup>th</sup> Circuit concluded that the government established by a preponderance of the evidence that Miggins possessed a weapon in connection with the drug trafficking activity. Contrary to Miggins’ claim, the court ruled that it was not “clearly improbable” that he possessed the firearms during the offense. Accordingly, the 6<sup>th</sup> Circuit ruled that the district court did not err in applying the two level enhancement to Miggins’ base offense level.

The next issue considered by the 6<sup>th</sup> Circuit was whether the district court erred by denying McDaniels’ motion to suppress physical evidence. McDaniels claimed that even though the district court found that probable cause did not exist to justify the

issuance of the search warrant for his apartment, it erred in finding that the search of his residence was valid under the good faith exception announced in *Leon*.

To satisfy the warrant requirement, the police must have probable cause to conduct a search. In this case, the 6<sup>th</sup> Circuit ruled that probable cause existed to justify the issuance of a search warrant for McDaniels’ and Miggins’ apartment. Because the 6<sup>th</sup> Circuit ruled that probable cause existed to support the issuance of the search warrant for the apartment, it was not necessary to address whether the *Leon* good faith exception applied.

In his appeal, Moore challenged the district court’s denial of his motion to suppress the firearm seized from his residence. Moore claimed that the triggering event for the anticipatory warrant was not fulfilled to justify the execution of the search warrant on Moore’s residence.

The affidavit stated that “when the package containing the cocaine is delivered to this address and possession of the package is taken by someone inside the residence, as is anticipated, then and only then will the search warrant be executed.” Moore maintained that the district court erred in finding that the triggering event of the anticipatory search warrant occurred because no one inside the house took delivery of the package. Instead, because Miggins, McDaniels, and Watson were outside of the house when the Federal Express van delivered the package and they immediately left the premises with the package, the search of Moore’s residence was unauthorized because the triggering event language was not satisfied.

An anticipatory search warrant is a search warrant that “by its terms takes effect not upon issuance but at a specified future time.” Although courts have required that conditions triggering the anticipatory search warrant be “explicit, clear, and narrowly drawn, warrants and their supporting documents are to be read not hypertechnically but in a common sense fashion.”

One officer testified that Miggins, McDaniels, and Watson went into and out of Moore’s residence before Miggins signed for the package. Although Watson testified at the

suppression hearing that he and his co-defendants never entered Moore's residence, the district court concluded that the officer's testimony that the three men went into and out of the residence to be more credible than Watson's version.

After reviewing the record, the 6<sup>th</sup> Circuit believed that the triggering event for the anticipatory search warrant was met. In this case, the triggering event required the delivery and acceptance of the package by someone inside the residence. On its face, the affidavit did not require that the person receiving the package actually be inside the residence when the package was delivered or that the person receiving the package take it inside the residence.

Instead, read in a common sense fashion, and avoiding a hypertechnical construction, the court held that the triggering event language of the affidavit was satisfied when the package was taken by someone who had been inside the residence just prior to its delivery. Therefore, the district court's finding that the three men were inside of the residence before the package was delivered satisfied the triggering event. Consequently, the anticipatory search warrant was properly executed.

Finally, the 6<sup>th</sup> Circuit ruled that the district court did not err in finding that Moore knowingly, voluntarily, and intelligently waived his *Miranda* rights. The government established that Officer Adams orally advised Moore of his *Miranda* rights and that Moore understood his rights. Moreover, there was nothing in the record to indicate that Moore's will was overborne such that he was coerced into making any statements to Officer Adams. Accordingly, the sentences and convictions imposed in this case were affirmed.

***Marcum v. Lazaroff***, 301 F.3d 480 (6<sup>th</sup> Cir. 2002).

In 1991, Marcum pled guilty to attempted complicity to aggravated burglary. Marcum filed a § 2254 petition on May 11, 1999 which the district court denied as it was not timely filed. A certificate of appealability issued on whether Marcum's claims in his § 2254 petition were barred by the one year statute of limitations found in 28 U.S.C. § 2244(d).

On appeal, Marcum claimed that the district court erred in ruling that direct review of his case ended in 1992 when he failed to file his direct appeal of his conviction to the Ohio Supreme Court, rather than when the Ohio Supreme Court denied his petition for delayed appeal on April 20, 1998.

The 6<sup>th</sup> Circuit rejected Marcum's argument that the one year statute of limitations began to run at the time that the Ohio Supreme Court denied his motion for delayed appeal. Instead, the 6<sup>th</sup> Circuit endorsed its handling of this issue in *Searcy v. Carter*, 246 F.3d 515 (6<sup>th</sup> Cir. 2001) where the court, in explicit detail, set forth what constitutes a direct appeal for purposes of calculating the statute of limitations under § 2244(d). Consequently, the dismissal of Marcum's § 2254 petition was affirmed.

***United States v. Askarov***, 299 F.3d 896 (6<sup>th</sup> Cir. 2002).

Askarov owned and operated a jewelry business in Belgium and he flew from Paris to Cincinnati. United States Customs Service agents arrested Askarov near the Cincinnati airport after discovering 9.5 kilograms of ecstasy in his luggage.

Askarov was indicted for possession with the intent to distribute as well as the illegal importation of ecstasy into the United States. Attorney Gary Sergent was appointed to represent Askarov. However, based on evidence that Askarov owned his own business, the court later questioned whether Askarov was eligible for court-appointed counsel. Consequently, Sergent moved to withdraw as Askarov's counsel.

Two days later Sergeant sent a letter to Askarov's Pretrial Services Officer that was accompanied by a fax from a bank based in Antwerp, Belgium. The fax explained that Askarov had defaulted on home and business loans held by the bank and that the bank had frozen all lines of credit to him. Moreover, the bank made it clear that it would pursue foreclosure of Askarov's home.

In his letter to Askarov's Pretrial Services Officer, Sergent notified the officer that he had moved to withdraw as counsel and suggested that the fax from the bank might be useful to the magistrate judge in deciding whether Askarov had the ability to retain new

counsel. Sergeant also sent a copy of his letter and the fax from the bank to the AUSA prosecuting the case.

The following day, the magistrate judge granted Sergeant's motion to withdraw as counsel and Askarov later hired counsel. At trial, Askarov testified on direct examination that he owned and operated a jewelry business in Antwerp. However, despite his portrayal of himself as an entrepreneur, the government asked him the following question "prior to your arrest, isn't it true that you were having financial problems with your business?" Askarov answered "No, I didn't have any problem." The prosecutor then asked Askarov about his outstanding home and business loans to the bank and read to him the fax that Sergeant had previously provided.

Askarov's attorney objected to the government's use of the document and moved for a mistrial. However, the district court overruled the objection and required Askarov to answer the question. Askarov was convicted, sentenced to prison, and he filed a timely appeal.

On appeal, Askarov maintained that the information provided by Sergeant that was used to assert Askarov's 6<sup>th</sup> Amendment right to counsel may not be used against him as substantive evidence of his guilt. Askarov argued that to allow the use of this information forced him to choose between his 6<sup>th</sup> Amendment right to counsel and his 5<sup>th</sup> Amendment privilege against self-incrimination.

The 6<sup>th</sup> Circuit did not explicitly decide Askarov's claim of constitutional error because the court concluded that, beyond a reasonable doubt, any such error resulting from the prosecutor's reference to the bank fax was harmless. The government's evidence against Askarov was overwhelming. Furthermore, the prosecutor could have obtained the disputed financial report directly from Askarov's bank even if his counsel had not provided it. Consequently, the court affirmed Askarov's conviction.

*United States v. Orsolini*, 300 F.3d 724 (6<sup>th</sup> Cir. 2002).

In June 2000, Orsolini was pulled over for speeding by Tennessee Highway Patrol Trooper Pierce at 3:11 P.M. According to

Trooper Pierce's radar gun, Orsolini's car was traveling in excess of 80 m.p.h. in a 65 m.p.h. zone. As Trooper Pierce approached the car, he asked Orsolini for his driver's license and vehicle registration. Orsolini gave Pierce his interim California driver's license and a bill of sale.

According to the bill of sale, the car was purchased in El Paso, Texas four days earlier. Consequently, the car had a temporary tag displayed. Trooper Pierce asked Orsolini where he and his passenger were traveling and Orsolini said that they were traveling from California to Boston to see family. As he was speaking with Orsolini, Pierce observed a food bag and several food wrappers on the floorboard of the car and a large pile of clothes and luggage on the back seat.

Trooper Pierce thought that it was suspicious that the luggage was on the back seat rather than in the trunk. Moreover, Pierce inferred from the appearance of the car that Orsolini had been traveling without stopping to eat or change clothes. Based on these observations and the fact that the bill of sale for the car was from El Paso, which Pierce knew to be a common entry point for illegal drugs, he suspected that Orsolini and his passenger were engaged in drug trafficking.

Trooper Pierce returned to his patrol car to issue a citation for speeding and he called another trooper for assistance. Trooper Brinkley arrived on the scene approximately ten minutes later. After conversing with Trooper Pierce for a few minutes, Trooper Brinkley questioned Orsolini and his passenger.

Orsolini told Trooper Brinkley that he was traveling from Texas to Boston to visit high school friends. Orsolini also told Trooper Brinkley that he was unemployed and that the car that he was driving was new when he bought it. The passenger was interviewed by Trooper Brinkley and she informed him that they were traveling from Texas to Boston to visit Orsolini's family.

Trooper Pierce issued a citation to Orsolini for speeding and told him that he was free to leave. However, as Orsolini was preparing to drive away, Trooper Brinkley asked Orsolini if he had anything illegal in the

car and whether he would permit the officers to conduct a search.

According to Trooper Pierce, Orsolini became visibly nervous. Orsolini's left eye began twitching, his breathing became more rapid, and the artery in his neck started bulging. However, Orsolini consented to the search. After Trooper Pierce asked Orsolini to stand at the side of the road and remove his hands from his pockets, Orsolini withdrew his consent. The officers then told Orsolini and his passenger that they were free to go, but the car was going to be held until a canine unit arrived.

When the canine unit arrived, Orsolini and his passenger stated that they wanted to go to the next highway exit to use the restroom and to get something to drink. The passenger said that she would walk but Trooper Brinkley informed her that pedestrians were not allowed on the interstate. Consequently, another trooper was called to the scene for the purpose of transporting Orsolini and the passenger to a store at the next highway exit.

Approximately 50 minutes after the stop, a drug canine arrived on the scene and detected a presence of drugs in the car. Consequently, the officers opened the door, the dog entered the car, and the dog indicated that there were drugs in the trunk. At this point, the trooper who transported Orsolini and the passenger to the store was radioed and requested to bring them back to the car. Orsolini and his passenger were arrested after marijuana was found in the car's trunk.

Orsolini was charged with possession with intent to distribute marijuana and conspiracy to commit the same crime and he filed a motion to suppress physical evidence. The district court concluded that the officers did not have a reasonable basis to justify their suspicion that Orsolini was involved in criminal activity and the government filed an interlocutory appeal.

The 6<sup>th</sup> Circuit ruled that a traffic stop was analogous to a *Terry* stop and that following the initial stop, the subsequent detention could not be excessively intrusive and must be reasonably related in time to the investigation. In analyzing the reasonableness of the subsequent detention, a court must consider whether the officer's action was

justified at its inception and whether it was reasonably related in scope to the circumstances which justified the interference in the first place. A temporary detention for questioning is justified by specific and articulable facts that give rise to a reasonable suspicion of criminal activity.

In determining whether reasonable suspicion was present, a court must consider the totality of the circumstances. Reasonable suspicion can be based on a totality of the circumstances, no one of which standing alone would create a reasonable suspicion.

The 6<sup>th</sup> Circuit found that the district court erred by individually analyzing each circumstance relied upon by the officers to suspect that Orsolini was involved in drug trafficking. Instead, the district court was obligated to base its decision on the totality of circumstances. The 6<sup>th</sup> Circuit ruled that none of the individual circumstances was alone sufficient to create a reasonable suspicion of criminal activity, but when combined with all of the factors of this case, the court found that they were sufficient to support a reasonable suspicion.

The court next considered whether Orsolini and his passenger were detained for an unreasonable amount of time without probable cause. The district court concluded that the detention of Orsolini was an unlawful seizure and that the contraband discovered during the ensuing search should be suppressed.

However, the government asserted that Orsolini was not detained because the officers told him that he was free to leave and because he was given a ride to the nearest exit. In the alternative, the government contended that even if Orsolini was detained, the nature of the detention was not unreasonable.

Although an officer may have reasonable suspicion to detain a person or his possessions for investigation, the officer's investigative detention can mature into an arrest or seizure if it occurs over an unreasonable period of time or under unreasonable circumstances. An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. A court should "examine whether the police diligently pursued a means

of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.”

The 6<sup>th</sup> Circuit concluded that Orsolini was not detained for an unreasonable period of time. The traffic stop began at 3:11 P.M. and by 4:02 P.M., the canine unit had arrived on the scene and alerted the officers to the presence of drugs. Therefore, the entire investigation lasted for less than one hour. Of that time, approximately 35 minutes were spent waiting for a canine unit to arrive. The court ruled that this was not an unreasonable amount of time given that much of the delay occurred because the canine unit was off-duty.

Finally, the 6<sup>th</sup> Circuit held that under all of the circumstances, there was no reason to believe that the officers did not diligently pursue their investigation or that the detention lasted any longer than was reasonably necessary to effectuate the purpose of the *Terry* stop. Consequently, the 6<sup>th</sup> Circuit ruled that the district court erred by granting Orsolini’s motion to suppress.

***United States v. Stevens***, — F.3d —, 2002 WL 1988210 (6<sup>th</sup> Cir. 2002).

In March 1995, Stevens purchased a commercial building in Flint, Michigan that was located on a busy street in a mixed-use neighborhood. Commercial buildings were adjacent to Stevens’ building and at least one residence was located across the street. The building that Stevens purchased had a rubber roof and contained a restaurant, laundromat, and a garage/warehouse where automobiles, gasoline, and drums of transmission fluid were stored.

Stevens had difficulty renting the commercial space in the building and as a consequence, he had difficulty making his monthly mortgage payments. Stevens was delinquent in his property taxes, owed money on his water and gas bills, and owed money on the washers and dryers that he rented for the laundromat.

Later in 1995, Stevens availed himself of the age old remedy of self-help by approaching three people with requests that they burn down his building. The first individual, David Watson, testified that Stevens twice asked him to burn the building. On the second occasion, Watson testified that

Stevens informed him that he could start the fire in the garage area because the oil and transmission fluid would catch fire quickly and spread to the building’s rubber roof.

In early 1996, Stevens approached Allen Hensley who testified that Stevens told him that the garage area would be the ideal place to set a fire to burn the building down. However, Hensley declined Stevens’ offer and finally, in October 1996, Stevens asked Thaddeus Troutt to burn the building down. During their discussion, Stevens assured Troutt that he would not get caught because Stevens had previously burned down two buildings and collected the insurance proceeds without getting into trouble. However, Troutt declined Stevens’ offer.

In August 1996, Stevens obtained a substantial insurance policy on the building. In November 1996, Stevens re-listed the property for sale after which he hired a repair person to clean the furnace and install a new cap on the chimney. Additionally, Stevens hired two workers to install drywall in the restaurant area. Stevens left the building with the drywall contractors at 7:00 P.M. and 35 minutes later, the fire alarm activated.

When firefighters arrived at the scene a few minutes later, they were confronted with heavy smoke and flames throughout the building. Due to the building’s rubber roof, the fire was most intense on the ceiling, causing plaster and tiles to fall from the roof onto the firefighters. The fire was so intense that the firefighters could stay in the building only a few minutes and then had to leave because they feared that the rubber roof would collapse. Moments later, the roof did collapse and one firefighter had to be dragged to safety.

Stevens was indicted for arson and other offenses and he subsequently sought to exclude evidence related to the two previous fires for which he had filed insurance claims. The district court found that this “other acts” evidence was admissible but the court, through a cautionary instruction, limited its use by the jury. Moreover, the probative value of the evidence was deemed to outweigh any potential prejudice to Stevens.

Following a jury trial, Stevens was convicted of numerous offenses and at sentencing, the district court fashioned the

sentence for Stevens' convictions relating to his solicitation to commit arson based on USSG § 2K1.4(a)(2)(A). This guideline section mandates a base offense level of 20. The district court rejected the government's recommended application of § 2K1.4(a)(1)(A) which mandates a base offense level of 24 when a defendant "knowingly . . . created a substantial risk of death or serious bodily injury" to persons other than himself.

Stevens filed a timely notice of appeal and the government cross-appealed the district court's sentencing determinations. The first issue raised by Stevens was whether the district court acted properly by denying his motion *in limine* to exclude the "other acts" evidence. This evidence was based on Stevens' statements that he had paid others to set two other fires for which he had received insurance proceeds. After the evidence was admitted, the district court instructed the jury that it should use Stevens' statements only "in deciding his intent, motive, knowledge, and whether the fire was an accident."

Stevens maintained that the evidence about his involvement in two previous fires was admissible for no reason other than to establish his intent. Moreover, Stevens argued that the "other acts" evidence was more prejudicial than probative. In response, the government contended that the "other acts" evidence was admissible extrinsic evidence, or, in the alternative, was evidence intrinsic to the solicitation charges and was not unduly prejudicial.

The 6<sup>th</sup> Circuit employs a three-step process to review a district court's decision to admit "other acts" evidence. First, the actual determination that a prior act occurred is to be reviewed for clear error. The 6<sup>th</sup> Circuit will next review for abuse of discretion the district court's determination whether the evidence of "other acts" was presented for a legitimate purpose and whether its probative value outweighed the potential prejudice to the defendant.

Stevens did not dispute that he told others that he had set fire to two other buildings in order to collect insurance money. The 6<sup>th</sup> Circuit reviewed the record and concluded that the district court did not err by admitting evidence of prior fires for the

purpose of establishing "intent, motive, knowledge, and whether the fire was an accident."

In order to determine whether the probative value of Stevens' statements were substantially outweighed by the danger of unfair prejudice, the court considered: (1) whether the "other acts" evidence was unduly prejudicial; (2) if other means of proof were available; (3) when the "other acts" occurred; and (4) whether the district court gave a limiting instruction. After reviewing all of these factors, the 6<sup>th</sup> Circuit ruled that the probative value of this evidence outweighed the danger of unfair prejudice to Stevens.

The next issue considered by the court was the government's cross-appeal where it maintained that the district court erred by calculating Stevens' sentence under § 2K1.4(a)(2)(A) which yielded a lower base offense level than § 2K1.4(a)(1)(A). To determine whether the district court properly applied the guidelines in this case, the 6<sup>th</sup> Circuit considered the: (1) district court's conclusion that Stevens' actions created a substantial risk of death or serious bodily injury; and (2) evidence supporting a conclusion that the risk was created knowingly.

The district court had agreed with the government's position that the fire was "exceedingly intense" and that "Stevens' acts placed emergency personnel and the surrounding dwellings in danger." However, in order for the risk to firefighters and law enforcement personnel to warrant application of § 2K1.4(a)(1) "that risk must include something more than simply responding to the fire."

The 6<sup>th</sup> Circuit had previously considered a similar issue and held that § 2K1.4(a)(1)(A) will apply when one or both of the following two exacerbating circumstances exist: (1) the risk of a large explosion; or (2) the presence of nearby residences.

In this case, Stevens knew that the building's roof was rubber and was likely to burn quicker than a standard fire-resistant roof. Moreover, Stevens also knew that drums of transmission fluid and gasoline stored in the warehouse were fire accelerants. Finally, Stevens obviously recognized that the



building was located on a busy commercial street traveled by pedestrians with at least one residence close to the building.

The 6<sup>th</sup> Circuit found that these factors supported a finding that Stevens' actions created a substantial risk of death or serious bodily injury. Because Stevens plainly intended to burn the building to collect the insurance proceeds, he knew that burning the building would create a heightened risk of death or injury to emergency personnel or innocent bystanders; and he was clearly "aware" of the presence of accelerants that would cause the fire to spread rapidly throughout the building. Consequently, the 6<sup>th</sup> Circuit ruled that the district court erred by not applying § 2K1.4(a)(1)(A) and the case was remanded for sentencing with an order to apply the more severe base offense level.

***United States v. Stewart***, — F.3d —, 2002 WL 31010856 (6<sup>th</sup> Cir. 2002).

This consolidated case involves the appeals of six members of a drug trafficking conspiracy based in Chattanooga, Tennessee. In the mid-1990's, FBI agents in Chattanooga engaged in a long-term investigation into a drug trafficking conspiracy involving Nathan Benford and his wife Rena Benford and several of their associates. The agents obtained authorization for electronic surveillance of land-based telephone lines as well as mobile phones. The wiretaps occurred between April 22, 1998 and July 30, 1998 in conjunction with traditional surveillance and investigatory methods.

This investigation revealed a large drug trafficking conspiracy in the Chattanooga and Louisville, Kentucky areas. The investigation culminated in a massive indictment in which 24 defendants were charged with conspiracy to distribute, and possession with the intent to distribute cocaine and crack as well as numerous money laundering charges. The indictment failed to allege drug quantities attributable to each defendant. Defendants Stewart, Tramble, Rossell, and Lanxter all pled guilty to the drug conspiracy charge. Tramble also pled guilty to a money laundering charge. The plea agreements failed to specify relevant drug quantities. The Benfords tried their luck before a jury.

However, prior to their trial, the Benfords moved to suppress the evidence procured from the wiretap and they asked for an evidentiary hearing. The district court denied the Benfords' motions to suppress without the benefit of the hearing. The wiretap evidence was admitted at the Benfords' trial and they were convicted of the drug conspiracy and money laundering charges.

On appeal, the Benfords contended that the affidavit used to obtain the wiretap warrant did not satisfy the necessity requirements contained in 18 U.S.C. § 2518(1)(c) and that the district court erred by denying them an evidentiary hearing under *Franks v. Delaware*, 438 U.S. 154 (1978).

In *Franks*, the Supreme Court recognized a defendant's right to challenge the sufficiency of the previously issued and executed warrant by attacking the statements contained in an affidavit in support of the warrant. In order to obtain a hearing, the defendant must make a substantial preliminary showing that a false statement, knowingly and intentionally, or with reckless disregard for the truth, was included in the affidavit. If the alleged false statement was necessary to the finding of probable cause, the 4<sup>th</sup> Amendment requires that a hearing be held at the defendant's request.

Furthermore, the defendant must point to the disputed portions of the challenged affidavit and must support those charges with an offer of proof. If the defendant meets this burden, then the court must reconsider the affidavit without the disputed portions and determine whether probable cause still exists. If probable cause does not exist, then the court must hold a full evidentiary hearing to determine whether the affidavit was properly submitted.

In order to conduct electronic surveillance using a wiretap, law enforcement officials must secure authorization by making an application containing a "full and complete statement as to whether or not any other investigative procedures had been tried and failed, or why they reasonably appear to be unlikely to succeed if tried, or be too dangerous." This statutory "necessity requirement" was designed to ensure that

wiretapping was not resorted to in a situation in which traditional investigative techniques would suffice to expose the crime.

In this case, law enforcement officials alleged that the wiretap evidence was the only investigative technique reasonably likely to establish the full scope of the alleged criminal enterprise. Based on the affidavit provided, the district court determined that the need for electronic surveillance had been established thereby discharging its duty under 18 U.S.C. § 2518(3)(c).

Neither of the Benfords presented the district court with any affidavits to support their claim that the wiretap affidavit was false in any respect. Instead, the Benford's merely argued that electronic surveillance was not necessary under the circumstances because other investigative techniques were successful and two major co-conspirators who were purported to be dangerous were not even charged.

The 6<sup>th</sup> Circuit rejected the Benfords' arguments as being conclusory. In securing a wiretap warrant, the government is not obligated to prove the impossibility of other means of obtaining information. Instead, the necessity requirement merely obligates law enforcement officials to give "serious consideration to the non-wiretap techniques prior to applying for wiretap authority and that the court be informed of the reasons for the investigators' belief that such non-wiretap techniques had been or will likely be inadequate."

The 6<sup>th</sup> Circuit concluded that this is precisely what occurred in this case. The mere fact that some investigative techniques were successful in uncovering evidence of wrongdoing did not mandate that a court negate the need for wiretap surveillance. The court had previously recognized that "wiretapping is particularly appropriate when the telephone is routinely relied on to conduct the criminal enterprise and investigation."

In this case, members of the drug conspiracy facilitated the criminal enterprise through multiple telephone conversations from several locations. The Benfords provided no evidence to contest the government's contention that traditional methods of investigation would have been too

dangerous. The fact that the other two individuals whom the government particularly feared were not indicted was not germane to make this determination.

Consequently, the 6<sup>th</sup> Circuit held that the district court did not err in declining to hold a *Franks* hearing or by determining that the evidence was sufficient to satisfy the government's obligation to show necessity for the electronic surveillance under § 2518(1)(c).

The next issue considered was Tramble's attempt to vacate his guilty plea to the charge of aiding and abetting money laundering. Because Tramble did not raise this issue before the district court and did not claim that his plea was not knowing and voluntary, the court reviewed the district court's acceptance of Tramble's plea for plain error.

Tramble did not contest his actual guilt or the validity of his guilty plea on the charge of aiding and abetting money laundering. Instead, Tramble maintained that the money laundering charge should have been dismissed because his co-defendant whom Tramble labeled as the "principal perpetrator" was acquitted of this count by the jury. Because of this fortuitous event, Tramble, requested the 6<sup>th</sup> Circuit to invent a new legal rule holding that courts should dismiss the indictment of a defendant who pleads guilty prior to or after a jury acquits his co-conspirator of the same offense.

The 6<sup>th</sup> Circuit rejected this specious argument. Instead, the court ruled that because the aiding and abetting statute treats aiding and abetting as principal liability, "there is no requirement that a *de facto* principal be convicted of an offense prior to convicting someone as an aider and abettor, nor is there even a bar to prosecuting someone as an aider and abettor after an alleged *de facto* principal is acquitted."

Defendants Nathan and Rena Benford, Tramble, Stewart, and Rossell next argued that the district court committed constitutional error under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) by sentencing them to terms of imprisonment based on the district court's findings of drug quantities by a preponderance of the evidence.

All five defendants were sentenced

under 21 U.S.C. § 841(b) which creates a three-tiered sentencing system based on drug quantities. Defendants face a sentence of 5-40 years imprisonment under § 841(b)(1)(B) if they are responsible for between 5 and 50 grams of crack or between 500 grams and 5 kilograms of powder cocaine. Under § 841(b)(1)(A), defendants face between 10 years and life imprisonment if they are connected to 50 grams or more of crack or 5 kilograms or more of powder cocaine. However, where no amount of drugs is specified in the indictment or determined by the jury beyond a reasonable doubt, § 841(b)(1)(C) provides a default maximum penalty of 20 years, or 30 years in the case of a repeat felony drug offender.

In this case, the indictment did not specify the drug quantity attributable to each defendant. Moreover, with respect to the Benfords, the district court never instructed the jury to determine the drug amounts. Instead, the jury merely found that the defendants had conspired to distribute and possess some undetermined amount of crack.

Similarly, the plea agreements entered into by Tramble, Stewart, and Rossell also failed to specify drug quantities. However, the district court found, by a preponderance of the evidence, the quantity of drugs for which each defendant was accountable. The district court then used these drug quantities to determine the applicable statutory penalties and to impose sentence under § 841(b).

The first issue tackled by the 6<sup>th</sup> Circuit was the appropriate method of preserving an *Apprendi* challenge. The court found that the alleged constitutional error did not lie in the indictment itself. The government's failure to allege a drug quantity did not render the drug distribution indictment constitutionally infirm. Instead, when specific drug quantities are not alleged, a defendant should be sentenced under § 841(b)(1)(C) which establishes a default statutory maximum sentence and does not require proof of a specific quantity of drugs as an element of the offense.

The government maintained that the defendants failed to preserve their *Apprendi* challenges by not raising them before the district court at the time of sentencing. In

order to preserve an *Apprendi* challenge for purposes of an appeal, the defendant must, at a minimum, object to the method of drug calculation. The court applied these principles to this case and concluded that both Nathan and Rena Benford raised constitutional objections to their respective sentences and thus preserved their *Apprendi* challenge for 6<sup>th</sup> Circuit review.

In contrast, although Rossell, Tramble, and Stewart challenged certain quantities of drugs attributed to them, none raised constitutional arguments or otherwise challenged the propriety of the evidentiary standard use by the district court in determining drug quantity. Like the Benfords, Rossell, Tramble, and Stewart were sentenced after *Jones v. United States*, 526 U.S. 227 (1999) was decided and could have relied on that case to submit their objections.

Consequently, as a result of this shortcoming, the 6<sup>th</sup> Circuit reviewed the *Apprendi* claims of Rossell, Tramble, and Stewart, for plain error. In comparison, the *Apprendi* claims of Nathan and Rena Benford were reviewed *de novo* because they properly preserved their *Apprendi* argument.

With an unspecified drug quantity in the indictment, Nathan Benford faced a statutory maximum sentence of 30 years because of his prior felony drug conviction. However, based on the district court's drug quantity determinations, Nathan was sentenced to life imprisonment.

Because Rena Benford's indictment did not specify a drug quantity and this fact was not found by her jury, Rena faced a default maximum sentence of 20 years imprisonment under § 841(b)(1)(C). However, after making the relevant drug quantity determinations, the district court sentenced Rena to serve 365 months imprisonment.

Under *Apprendi*, a defendant may not be exposed to a greater punishment than authorized by the jury's guilty verdict. Because the jury did not determine a quantity of drugs beyond a reasonable doubt, the Benfords should have been sentenced under the penalties proscribed under § 841(b)(1)(C). Consequently, the 6<sup>th</sup> Circuit concluded that the sentences imposed on the Benfords

violated the rule announced in *Apprendi*.

The government maintained that even if the Benfords established *Apprendi* violations, their sentences should be affirmed because any error was harmless. The government arrived at this conclusion because in its opinion, the Benfords could not point to any evidence that was presented to the jury that would lead to a lower drug amount determination because there was “overwhelming evidence” of their involvement in the drug quantities found by the district court.

In *Neder v. United States*, 527 U.S. 1 (1999), the Supreme Court distinguished between “trial errors” which may be reviewed for harmless error and “structural errors” which are excluded from harmless error review. A structural error reflects “the defect affecting the framework within which the trial proceeds, rather than simply error in the trial process itself.” Structural errors require automatic reversal, despite the effect of the error on the trial’s outcome. For all other errors, courts must apply Fed. R. Crim. P. 52(a)’s harmless error standards and disregard errors that are harmless beyond a reasonable doubt.

The 6<sup>th</sup> Circuit concluded that the omission of the drug quantity element from the indictment did not deprive the district court of subject matter jurisdiction over the case. As a result, the court declined to categorize the omission from the indictment that occurred as a “structural error.” In applying a harmless error standard of review, a court reviewing whether an *Apprendi* error occurred must look to whether the omitted element is supported by uncontroverted evidence and also ask whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.

In this case, Nathan Benford not only failed to challenge the amount of drugs attributed to him, but there was also uncontroverted evidence presented at the trial that showed that Benford trafficked in quantities exceeding 50 grams of crack and 5 kilograms of cocaine powder. As a result, the 6<sup>th</sup> Circuit concluded that it had no “doubt based on the uncontroverted evidence that a

jury would have found beyond a reasonable doubt that Nathan Benford was involved with quantities of drugs well above the requisite amounts needed for sentencing under § 841(b)(1)(A).”

Therefore, the *Apprendi* error in Nathan Benford’s case was harmless beyond a reasonable doubt. The majority of the panel also came to the same conclusion in Rena Benford’s case and ruled that the *Apprendi* error in her case was also harmless beyond a reasonable doubt.

The 6<sup>th</sup> Circuit next considered the *Apprendi* claims of Rossell, Tramble, and Stewart. Rossell pled guilty to the drug conspiracy charge and because of his prior drug conviction, the maximum sentence that he faced under the default provision of § 841(b)(1)(C) was 30 years imprisonment. Based on the district court’s relevant conduct determinations, it found that Rossell’s sentencing range was between 10 years and life imprisonment. The district court imposed a 10 year sentence.

Tramble also pled guilty to the drug conspiracy charge which did not specify a drug quantity. Like Rossell, because of Tramble’s prior record, he faced a maximum sentence of 30 years under the default provision.

The district court determined that Tramble was responsible for more than 14.5 kilograms of crack which exposed him to a mandatory minimum sentence of 20 years and the maximum of life imprisonment. Under the guidelines, Tramble’s sentencing range was 292 to 365 months. After the government filed its downward departure motion for Tramble’s substantial assistance, he was sentenced to 200 months imprisonment.

With an undetermined drug quantity, Stewart faced a maximum sentence of 20 years imprisonment under § 841(b)(1)(C). The district court determined that Stewart was responsible for 807 grams of crack and this determination exposed her to a minimum sentence of 10 years and the maximum of life imprisonment. Stewart was sentenced to serve 190 months imprisonment.

The 6<sup>th</sup> Circuit concluded that the sentences imposed on Rossell, Tramble, and Stewart did not violate *Apprendi*. The court

predicated its decision on *United States v. Cotton*, 122 S. Ct. 1781 (2002). In *Cotton*, the Court found that even if the defendants established the existence of an error that was plain and affected their substantial rights, an appellate court “may . . . exercise its discretion to notice a forfeited right only if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.”

There was overwhelming evidence in the record that demonstrated that Rossell, Tramble, and Stewart were involved in a drug conspiracy that involved drug quantities well above that necessary to impose sentences under the higher ranges of § 841(b). Despite the fact that *Apprendi* had been violated and even assuming that the defendants’ substantial rights had been affected, the 6<sup>th</sup> Circuit would not address the error because the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. To the contrary, the court found that the “real threat to the judicial proceedings would be to allow the defendants to receive a sentence prescribed for those committing less substantial drug offenses.”

The court next considered other sentencing issues raised on appeal by Rossell, Rena Benford, and Stewart. The first issue was whether the two level enhancement for possession of a firearm under USSG § 2D1.1(b)(1) was properly applied by the district court to Rossell’s and Rena Benford’s cases.

To apply this enhancement, the government must establish: (1) that the defendant actually constructively possessed the weapon; and (2) that such possession was during the commission of the offense. Once it is established that a defendant was in possession of a weapon during the commission of an offense, the presumption arises that such possession was connected to the offense. The burden then shifts to the defendant to show that it “was clearly improbable that the weapon was connected to the offense.”

Constructive possession of an item is “the ownership or dominion or control over the item itself, or dominion over the premises where the item is located.” If the offense committed is part of a conspiracy, the

government does not have to prove that the defendant actually possessed the weapon. Instead, the government only needs to “establish that a member of the conspiracy possessed the weapon and that the member’s possession was reasonably foreseeable by the members in the conspiracy.”

In this case, authorities found a loaded revolver stuffed under Rossell’s mattress. Rossell did not contend that he did not possess the weapon. Instead, Rossell maintained that he had given the gun to his father as a gift and that upon his father’s death, the gun was returned to Rossell so that he could give it to his own son once he was 18 years of age.

Consequently, Rossell argued that the district court erred in finding that there was a nexus between his drug offense and the revolver because there was no cocaine found inside his home and none of the co-conspirators indicated that he brandished the firearm.

The 6<sup>th</sup> Circuit rejected this argument and found that the facts of this case reflected that there was a sufficient nexus between the firearm and the drug activity. The loaded weapon, which as a convicted felon Rossell should not have had in the first place, was in his bedroom. Marijuana was also found in the bedroom closet. Rossell admitted that he would trade marijuana to his cocaine suppliers in order to obtain a discounted price. Moreover, authorities found plastic baggies and scales in Rossell’s garage.

Rossell and his wife admitted in wiretap recordings that drug transactions were arranged from their residence. Consequently, Rossell failed to meet his burden of showing that it was clearly improbable that the weapon was connected to his drug trafficking offense.

Rena Benford contended that the two level enhancement was improper in her case because when authorities searched her home, they found no cocaine or drug paraphernalia. Instead, the authorities found a loaded pistol in the master bedroom dresser drawer. Authorities also seized more than \$20,000 in cash which Rena did not deny was connected to drug activity. Recorded conversations revealed that Rena’s residence was used to collect drug money related to the drug trafficking offense.

The government contended that the facts sufficiently demonstrated that the weapon was jointly possessed by both Benfords and was used to protect themselves and the drug proceeds. The 6<sup>th</sup> Circuit ruled that Rena Benford had constructive possession over the weapon because she, at a minimum, had ownership, dominion, or control over the weapon. As a result, it was not clearly improbable that the weapon was related to her drug trafficking offense.

Rossell appealed the district court's denial of his motion for downward departure based on "exceptional circumstances" found in USSG § 5K2.0. Rossell maintained that the district court failed to appreciate the exceptional significance of his background. According to Rossell, when all of the applicable mitigating factors were considered in the aggregate, he was entitled to a downward departure under the guidelines.

In the 6<sup>th</sup> Circuit, a decision by a district court not to depart downward from the guidelines is not reviewable unless the record reflects the district court either was not aware of or did not understand its discretion to make such a departure. The 6<sup>th</sup> Circuit reviewed the record and concluded that the district court was clearly aware of its discretion to depart in Rossell's case but found that there were insufficient factors on which a downward departure could be justified.

Timothy Lanxter had a sentencing range of between 51 and 71 months. However, the district court concluded that because of Lanxter's prior felony drug conviction, the statutory mandatory minimum of 120 months was triggered under § 841(b)(1)(B). The district court departed below the statutory minimum for Lanxter's substantial assistance, after the government filed a motion pursuant to 18 U.S.C. § 3553(e). The district court then reduced Lanxter's sentence to 92 months.

On appeal, Lanxter challenged the method used to calculate the sentence imposed after he was granted a downward departure for substantial assistance. Lanxter asked the 6<sup>th</sup> Circuit to determine whether, by using his 120 month mandatory minimum sentence as a starting point for its downward departure calculation, the district court erred by ignoring

the language in § 3553(e) directing the court to rely upon the guidelines in calculating reduced sentences. Furthermore, Lanxter maintained that once the district court granted a § 3553(e) motion to depart from a statutory minimum sentence, the resulting sentence may be no higher than the upper end of the otherwise applicable guideline range. Applying this logic to his case, Lanxter posited that after a downward departure was granted, his sentencing range should have been between somewhere within the guideline range of 51-71 months.

The 6<sup>th</sup> Circuit rejected the logic advanced by Lanxter and ruled that the appropriate starting point for calculating a downward departure under § 3553(e) was the mandatory minimum sentence itself. Consequently, the sentence imposed could exceed the guideline range as calculated prior to the application of the statutory mandatory minimum.

***Hutchison v. Bell***, — F.3d —, 2002 WL 1988196 (6<sup>th</sup> Cir. 2002).

Hutchison was convicted in Tennessee for murder, solicitation to commit murder, and conspiracy to commit murder. The prosecutor's theory of the case was that Hutchison, an alleged drug dealer, conspired with his co-defendant, Chip Gaylor, and several other men to kill Hugh Huddleston so that they could share nearly \$800,000 in insurance proceeds.

According to the evidence adduced at trial, Huddleston had a father-son relationship with Gaylor. Huddleston was exceedingly generous with Gaylor, he frequently gave Gaylor money, and allowed Gaylor to live with him. In addition, Gaylor was the sole beneficiary of Huddleston's life insurance policy and will. The value of Huddleston's estate was \$289,000.

Hutchison, Gaylor, Miller, Hatmaker, and Varnadore, Curnutt, and Rollyson were all arrested on suspicion of murder in connection with Huddleston's death. Hutchison and Gaylor were tried together and the chief prosecution witness was Richard Miller. Miller's testimony was used to weave together the state's theory of a conspiracy to kill Huddleston.

Miller recounted a conversation

between himself, Gaylor, and Hutchison in which Hutchison “talked about how much money he could make if he took insurance out on somebody and then had them killed.”

Miller testified that about one week later, Hutchison asked Gaylor to get Huddleston to sign some insurance papers and a promissory note representing a \$50,000 loan from Hutchison to secure an insurance policy. Miller noted that Huddleston would do anything that Gaylor asked. Consequently, at Gaylor’s urging, Huddleston signed a \$250,000 life insurance policy, later changed to include an additional \$250,000 accidental death benefit which named Hutchison as a sole beneficiary.

Hutchison then offered money to both Gaylor and Miller to kill Huddleston. Gaylor refused because his financial interest in Huddleston’s estate would make him an obvious suspect. Miller also refused. Consequently, Hutchison asked Varnadore, one of his alleged drug partners, to arrange the murder. Varnadore and Hutchison agreed to drown Huddleston during a fishing trip because Huddleston could not swim. Gaylor arranged a fishing trip with Huddleston at Norris Lake but only Miller showed up to accompany Huddleston on the day of the trip.

Sometime after dark, Hatmaker and Rollyson traveled to the pontoon boat that was rented and joined Huddleston and Miller. After Miller left, Hatmaker pushed Huddleston into the water. When Miller returned to the boat, all of the men were gone. Miller reported Huddleston’s disappearance and the body was found in the lake later that day.

In addition to the testimony of Miller and Rollyson, the prosecution also introduced several letters written by Hutchison to Miller and Varnadore communicating with them about the case and urging them to keep quiet. Hutchison’s cell mate testified that Hutchison told him that his conspirators knew better than to say anything and if “they did they would end up the same way as the other guy.”

Gaylor and Hutchison both testified at their trial. During its cross-examination of Gaylor, the prosecution introduced evidence of a civil complaint that Gaylor had filed in federal court. In the complaint, Gaylor argued

that he should recover the proceeds of a \$500,000 insurance policy naming Hutchison as beneficiary, because Hutchison was feloniously responsible for Huddleston’s death. Gaylor testified that he filed the claim solely upon his attorney’s advice and that he did not know how Huddleston died.

Hutchison testified that he did not know the value of Huddleston’s insurance policy other than it was enough to secure the promissory note that Huddleston had executed. Hutchison further stated that upon Huddleston’s death, he intended to seek recovery of only the \$50,000 value of the note but that upon the advice of his attorney, he filed a claim for the entire \$500,000 policy.

A jury found Hutchison guilty of numerous capital crimes. At sentencing, the state presented no additional evidence but sought the death penalty on the ground that Hutchison had “employed another to commit the murder for remuneration or the promise of remuneration.” This was a statutory aggravating factor under Tennessee law.

Hutchison adduced testimony about his good reputation in the community because his childhood and his ability to repair small engines, a skill he could use while in prison. Moreover, Hutchison’s father and wife testified about his good qualities as a son and spouse. The jailer even testified that Hutchison was a good prisoner. The jury also heard testimony that Hutchison had no prior criminal record and that he had been gainfully employed since adulthood.

Nonetheless, the jury sentenced Hutchison to death. Hutchison was unsuccessful on direct appeal and in the state post-conviction process. Having failed to gain relief in state court, Hutchison petitioned the district court under § 2254. The district court dismissed Hutchison’s petition and he appealed to the 6<sup>th</sup> Circuit.

Because Hutchison’s petition was controlled by the AEDPA, he was obligated to prove that the state court’s adjudication of his petition resulted in a decision that was “contrary to or involved an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States; or resulted in a decision that was based on an unreasonable determination

of the facts in light of the evidence presented in the state court proceeding.”

However, under the AEDPA, a state court’s determination of historical facts is presumed correct unless the petitioner rebuts this presumption with “clear and convincing evidence.” Under § 2254(e)(2), the AEDPA also limits a federal court’s ability to grant an evidentiary hearing: “if the applicant has failed to develop the factual basis of the claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that-- (A) the claim relies on -- (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the petitioner guilty of the underlying offense.

The Supreme Court has interpreted the opening clause of § 2254(e)(2) to contain its own “diligence” requirement separate and apart from that of § 2254(e)(2)(A)(ii). Thus, the “failed to develop” clause in § 2254(e)(2) means “not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts.”

The purpose of the default component of “failed” is to ensure the prisoner undertakes his own diligent search for evidence. “Diligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court.” Moreover, diligence for purposes of § 2254(e)(2) will require in the usual case that “the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law.”

If the habeas petitioner fails to meet the diligence requirement of § 2254(e)(2), he is then channeled into the strict requirements of § 2254(e)(2)(A)&(B). Under those circumstances, a federal court may grant an evidentiary hearing only if the claim relies on a “new rule of constitutional law” or facts “that could not have been previously

discovered through the exercise of due diligence;” and “the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.”

Hutchison argued that the state court’s failure to sever his trial from that of Gaylor’s prejudiced him in two ways. First, it permitted Gaylor’s civil complaint, which named Hutchison as Huddleston’s killer, to be introduced as evidence against Hutchison in violation of the Confrontation Clause. Second, the failure to sever deprived Hutchison of a fair trial because it prevented him from introducing evidence that would have inculpated Gaylor and/or exculpated himself. Hutchison also maintained that the district court compounded this error by depriving him of an evidentiary hearing on this issue.

The 6<sup>th</sup> Circuit first considered whether the trial court erred by introducing evidence of the civil complaint. The complaint asserted that “Plaintiff Hutchison is barred from recovering any proceeds of the policy because he was feloniously responsible for the death of the insured.” On direct appeal, the Tennessee Supreme Court concluded that the complaint was not properly introduced to impeach Gaylor, but was instead inadmissible hearsay as to Hutchison. Nevertheless, the court ruled that the introduction of the complaint was harmless error.

Hutchison maintained that the admission of the complaint violated his 6<sup>th</sup> Amendment right to confront his accuser. In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court held that the admission of a non-testifying co-defendant’s confession which clearly implicated another defendant at a joint trial violated the other defendant’s rights under the Confrontation Clause.

However, the Court later limited the scope of the *Bruton* decision in *Nelson v. O’Neil*, 402 U.S. 622 (1971). In *O’Neil*, the prosecution elicited testimony about a co-defendant’s confession that implicated another defendant. The co-defendant testified at the joint trial and denied making the confession. The Court ruled that O’Neil’s rights were not



violated by the admission of his co-defendant's confession. The *O'Neil* Court explained that the holding in *Bruton* was limited to situations in which the co-defendant does not testify at trial thereby depriving the defendant of the opportunity to cross-examine the declarant of the confession.

The 6<sup>th</sup> Circuit ruled that in light of *O'Neil*, the Tennessee Supreme Court's decision that the admission of a civil complaint was harmless error was not contrary to, or an objectively unreasonable application of clearly established federal law. The Court arrived at this conclusion because *O'Neil* "instructs us that there is no constitutional violation if the co-defendant testifies on behalf of the defendant."

In this case, Gaylor testified favorably to Hutchison regarding the underlying facts. Gaylor stated that it was his lawyer's suggestion to attempt to recover under the insurance policy once Hutchison was indicted. Moreover, Miller stated that he did not hold the belief that Hutchison killed Huddleston, and that he did not know how Huddleston died. Consequently, the 6<sup>th</sup> Circuit found no reversible error.

Hutchison also maintained that the joint trial forced him to present a unified defense with Gaylor. Hutchison alleged that he was prevented from introducing evidence that would have inculpated Gaylor and/or exculpated himself.

However, Hutchison's severance claim did not warrant habeas relief according to the 6<sup>th</sup> Circuit. Instead, severance was governed by Tennessee state law and did not rise to the level of warranting habeas relief unless the error rose to the level of depriving Hutchison of fundamental fairness in the trial process.

Mutually antagonistic defenses are not prejudicial *per se*. The 6<sup>th</sup> Circuit ruled that Hutchison was free to pursue an antagonistic defense strategy. However, Hutchison declined to do so for fear that Gaylor would try to shift the blame towards him. Such a speculative risk was not sufficient to show that the Tennessee Supreme Court's decision upholding the joint trial was objectively unreasonable.

The court also ruled that Hutchison failed to develop the factual basis for his

severance claim. Hutchison's counsel never indicated what evidence he would have presented had the trial judge ruled favorably on the severance motion. The defense also did not indicate that it wished to present such evidence when it requested the severance. Without a record of the evidence that Hutchison would have presented at a separate trial, it was impossible for the 6<sup>th</sup> Circuit to conclude that the state court unreasonably determined that he was not prejudiced.

Hutchison also argued that the prosecution withheld material exculpatory evidence in violation of *Brady v. Maryland*, 379 U.S. 83 (1963). In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material to guilt or to punishment irrespective of the good faith or bad faith of the prosecution."

There are three components of a *Brady* violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the evidence must have been suppressed by the state, either wilfully or inadvertently; and (3) prejudice must have ensued.

The state court and the district court both concluded that Hutchison's *Brady* claims were procedurally defaulted. Moreover, the court found that Hutchison had not demonstrated a reasonable probability that the result of his trial would have been different had the materials been disclosed and therefore he could neither prove materiality nor prejudice to succeed on the merits of his *Brady* claim.

The 6<sup>th</sup> Circuit examines four factors to determine if the procedural default of a state rule will prevent a federal court's review on habeas: (1) there must be a state procedural rule applicable to the petitioner's claim which he did not comply with; (2) the state courts must have actually enforced the state procedural rule against petitioner's claim; (3) the state procedural forfeiture must be an adequate and independent state ground upon which the state can rely to foreclose review of a federal constitutional claim; and (4) if the above three factors are met, the court may still excuse the default if the petitioner can

demonstrate that there was cause for him not to follow the procedural rule and that he was prejudiced by the alleged constitutional error.

The 6<sup>th</sup> Circuit applied this four prong test to Hutchison's case and ruled that he procedurally defaulted his *Brady* claim because he could not demonstrate cause or prejudice for the default.

Hutchison next argued that his trial counsel's performance fell below a standard guaranteed by the 6<sup>th</sup> Amendment. Hutchison maintained that his counsel failed to investigate exculpatory and mitigating evidence that could have been presented at the guilt phase of the trial. In order to prevail on a claim of ineffective assistance of counsel, the petitioner must show deficient performance and prejudice.

Trial counsel's performance is deficient when it falls below an objective standard of reasonableness. However, the 6<sup>th</sup> Circuit rejected Hutchison's ineffective assistance of counsel claim because he failed to identify any witnesses that could have been called by trial counsel or to provide any facts as to what testimony the witnesses would have offered at his trial. In the absence of such evidence, the trial court had insufficient evidence to determine either if the failure to call witnesses was deficient performance by trial counsel, or if such failure constituted material prejudice to Hutchison's cause.

The final claim raised by Hutchison was that he was denied due process by the prosecutor's improper references, during his closing argument, to religion and Hutchison's alleged drug involvement. In his closing argument, the prosecutor referred to the Ten Commandments; alluded to Gaylor as a "Judas goat;" and referred to Hutchison as an "evil force" and leader of a "drug empire."

When a habeas petitioner makes a claim of prosecutorial misconduct, the touchstone of due process analysis is the fairness of the trial, not the culpability of the prosecutor. Thus, habeas relief is only warranted when the prosecutor's conduct was "so egregious so as to render the entire trial fundamentally unfair."

Whether a prosecutorial remark rises to the level of a due process violation depends on: (1) whether the remark tended to mislead

the jury or to prejudice the accused; (2) whether the remark was isolated or extensive; (3) whether the remark was accidentally or deliberately placed before the jury; and (4) the strength of the evidence against the accused.

Hutchison's claim regarding the prosecutor's impermissible reference to religion was procedurally defaulted. Moreover, Hutchison failed to elicit facts to show cause for his failure to raise this claim below. The district court and the Tennessee Criminal Appeals Court both concluded that the prosecutor's comments regarding Hutchison's drug involvement focused upon those issues for which the drug evidence was properly admitted. The courts also held that the prosecutor's comments were "fairly isolated and objected to by petitioner's counsel and that the prosecutor did not misstate the evidence."

The 6<sup>th</sup> Circuit agreed and concluded that Hutchison could not show that the courts' resolution of the prosecutorial misconduct claim was objectively unreasonable. The prosecutor's statements were directed at motive not propensity, and therefore did not mislead the jury. Moreover, the prosecutor's references to Hutchison as an "evil force" did not rise to a constitutional violation.

It is constitutional violation to call upon the jury to "solve a social problem, such as the drug trade," by convicting the defendant. However, it is not improper for the prosecutor to make a "mere allusion to the general need to convict guilty people." The prosecutor did not call upon the jury to "send a message" to anyone; he merely asked the jury to make Hutchison answer for his own guilty activities. Consequently, the remarks cited by Hutchison did not rise to the level of prosecutorial misconduct and the conviction and sentence imposed were both affirmed.

***United States v. Truman***, — F.3d —, 2002 WL 31050955 (6<sup>th</sup> Cir. 2002).

On February 23, 2000, Truman sold hydromorphone and methadone to an undercover officer. Truman was arrested the next day and interrogated by DEA agents. Truman initially lied about the manner in which he procured the pills, claiming that he purchased them from a man in a bar. When the agents expressed disbelief at Truman's

story, he responded “alright, I’ll come clean.”

Truman confessed that he worked at Roxanne Laboratories as a machinist and had stolen the tablets by secreting them in his sock. Truman explained that surveillance procedures at Roxanne were minimal in the areas where the tablets were manufactured. When asked if he had other controlled substances, Truman replied that he had methadone, morphine, and hydromorphone tablets stored in the trunk of his car in Ohio.

After obtaining Truman’s consent, agents searched his automobile and found these substances. Shortly thereafter, the DEA interviewed Truman about how he was able to defeat Roxanne’s security procedures. Truman then explained how he removed the tablets and described the lax security procedures at Roxanne..

Truman pled guilty to possession with intent to distribute hydromorphone, methadone, and morphine in violation of 21 U.S.C. § 841(a)(1). In the plea agreement, Truman agreed that the government could transfer information about the case to other federal and state law enforcement agencies and he consented to the entry of an order authorizing the release of grand jury information. The government agreed to recommend a sentence “at the lowest end of the applicable guideline range,” but did not promise to seek a downward departure for substantial assistance under USSG § 5K1.1.

The DEA investigators conducted a security investigation at Roxanne and met with the Vice President of Operations. Relying on Truman’s statements during their interview, the DEA agents uncovered numerous security lapses at Roxanne and subsequently prepared a report to the Vice President of Operations at Roxanne. As a result of this report, numerous security upgrades were implemented.

At sentencing, the district court ruled that the applicable guideline range was 121 to 151 months. However, Truman moved for downward departure pursuant to § 5K2.0 which permits departures for circumstances not contemplated by the Sentencing Commission in formulating the guidelines. Truman highlighted his significant cooperation with DEA investigators in their

effort to upgrade Roxanne’s security procedures as the grounds for the downward departure.

At the first sentencing hearing, a DEA investigator testified that Truman was cooperative and “didn’t hold back on us.” However, the investigator did not agree with Truman’s counsel that Truman’s help was “essential to uncovering the security lapses at Roxanne.” The district court remarked on the record that Truman’s help appeared to be essential in uncovering the security lapses.

Nonetheless, the district court rejected Truman’s motion to depart downward under § 5K2.0 after concluding that “I do not believe I have the authority to reduce Truman’s sentence under § 5K2.0.” Instead, the district court stated that its discretion to depart downward for substantial assistance could only be triggered by a government motion. The district court sentenced Truman to serve 121 months in prison and he filed a timely notice of appeal.

The 6<sup>th</sup> Circuit recognized that ordinarily, it would not review a district court’s discretionary decision not to depart from the guideline range. However, the 6<sup>th</sup> Circuit does have the authority to vacate a sentence where the district court erroneously believed that it lacked any authority to depart downward as a matter of law.

On appeal, the government contended that the sentencing court correctly concluded that it lacked discretion to depart downward because the basis of Truman’s request was substantial assistance to authorities and all substantial assistance motions are governed by § 5K1.1. In contrast, Truman argued that § 5K1.1 was not the exclusive provision for dealing with cooperation; but rather, the court could consider a defendant’s cooperation not contemplated by § 5K1.1 under the grant of discretion to sentencing judges embodied in § 5K2.0.

The 6<sup>th</sup> Circuit did not decide whether a district court was authorized to depart pursuant to § 5K2.0 for cooperation that was outside the scope of § 5K1.1. Instead, the court took guidance from the plain language of § 3553(e) which states: “upon motion of the government, the court shall have the authority to impose a sentence below a level established

by statute as a minimum sentence so as to reflect a defendant's substantial assistance in **the investigation or prosecution of another person who has committed a crime.**"

Moreover, § 5K1.1 in relevant part states: "Upon motion of the government stating that the defendant has provided substantial assistance **in the investigation and prosecution of another person who has committed an offense**, the court may depart from the guidelines." Thus, by its terms, § 5K1.1 and § 3553(e) apply only to substantial assistance in connection with the "investigation and prosecution of another individual who had committed a crime."

The 6<sup>th</sup> Circuit held that where the substantial assistance is directed at something other than toward the prosecution of another person, "the limitation of § 5K1.1 -- *i.e.* the requirement of a government motion as a triggering mechanism - does not apply." The court found that where cooperation does not involve the prosecution of another, there are few compelling reasons to require a government motion but instead to allow the sentencing judge to have the authority to exercise its sentencing discretion.

Consequently, the 6<sup>th</sup> Circuit ruled that where the information shared by the defendant with authorities involves exposing security breaches or revealing *modus operandi* that can be frustrated by prophylactic measures to prevent crime in the future, there is no good reason, and the guideline language suggests none, to condition the exercise of judicial discretion on a government motion.

Consequently, the 6<sup>th</sup> Circuit found that when a defendant moves for a downward departure on the basis of cooperation or assistance to government authorities, which does not involve the investigation or prosecution of another person, § 5K1.1 does not apply and the sentencing court is not precluded from considering the defendant's arguments solely because the government has not made the motion to depart.

The court next considered whether the sentencing court's discretion to depart downward was properly within the sweep of § 5K2.0. Truman maintained that his cooperation provided an extraordinary opportunity for the government and his former

employer to learn how its security measures were inadequate and were easily defeated.

In contrast, the government contended that Truman's statements to authorities were nothing more than his acceptance of responsibility for his own conduct which, although support an encouraged departure factor, were already taken into account when the offense level was reduced for his acceptance of responsibility. The 6<sup>th</sup> Circuit reviewed the transcript of the sentencing hearing and concluded that the sentencing judge appeared to be impressed with the extent of Truman's cooperation.

As a result, there was a basis in the record to conclude that Truman's cooperation extended beyond the garden variety "acceptance of responsibility" and was either not taken into account by the guidelines or was accounted for in the guidelines but was present to an exceptional degree. The court ruled that the district court was vested with the authority to depart from the guideline range and its refusal to depart downward misapprehended its authority. As a result, the case was remanded for resentencing.

***United States v. Bailey***, 302 F.3d 652 (6<sup>th</sup> Cir. 2002).

In 1999, Officers Davidson and Graham of the Morristown Tennessee Police Department were investigating complaints of drug trafficking in a trailer park in Morristown. According to Officer Graham, the police were making traffic stops on individuals who they suspected of being involved in drug trafficking once a traffic violation was observed.

Officers Davidson and Graham were exiting the trailer park when they encountered Bailey. Officer Davidson testified that Bailey's car entered the trailer park on the wrong side of the road and Officer Graham testified that Bailey's car almost hit his car.

Bailey testified that although the police car was "hogging" most of the narrow entrance road into the trailer park, there was still enough room for his car to go by. After the cars passed each other, Officer Davidson shouted at Bailey to stop his car. When Bailey did not immediately stop his car, Officer Davidson got out of his car and pursued Bailey's car on foot. Bailey eventually

stopped his car and Officer Davidson approached the driver's side of the vehicle to talk to Bailey.

According to Officer Davidson, Bailey kept reaching down to the floor board of his car. Officer Davidson first asked Bailey to keep his hands to himself. A drug dog was summoned to the scene and arrived two minutes after Bailey was removed from the car. While the dog sniffed for drugs in the car, Graham noticed that Bailey had put his hand in his pocket. Officer Graham asked Bailey to remove his hand and when Bailey removed his hand, Graham saw the butt of a gun. Police officers on the scene then handcuffed and arrested Bailey.

A search of the car following the drug dog's alert yielded three ounces of cocaine and two guns. Bailey was indicted for violating federal firearms and drug statutes. Bailey moved to suppress the evidence obtained in the search of his vehicle and his person.

Bailey alleged that the initial stop of the car, his arrest, and the searches were all conducted in violation of the 4<sup>th</sup> Amendment. The district court agreed and concluded that the initial stop was a pretext and "the officers' actions in stopping and searching Bailey were not justified at their inception, and their actions were not reasonably related in scope to the circumstances which justified the interference in the first place." The government filed a timely notice of appeal.

The 6<sup>th</sup> Circuit found that an officer's actual motivation for making a traffic stop is not germane in determining whether the stop was reasonable. As a result, it was irrelevant whether Officer Graham's initial stop of Bailey was "pretextual." Instead, the relevant question was whether the officers had probable cause to stop Bailey for a traffic violation?

The court concluded that the officers had probable cause to stop Bailey for a traffic violation. As a result of this conclusion, the court then queried whether the officers had sufficient reasonable suspicion to detain Bailey after the purposes of the traffic stop had been accomplished?

An ordinary traffic stop is more akin to an investigative detention than a custodial

arrest. Consequently, the principles announced in *Terry v. Ohio*, 392 U.S. 1 (1968) apply to define the scope of reasonable police conduct. Any subsequent detention after the initial stop must not be excessively intrusive in that the officer's actions must be reasonably related in scope to the circumstances justifying the initial interference. Once the purpose of the initial traffic stop was completed, the officer cannot further detain the vehicle or its occupants unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify further detention.

The 6<sup>th</sup> Circuit found that the purposes of the traffic stop in this case were never accomplished. The officers themselves testified that they were making "traffic stops" just to look for other illegal activity. Obviously, the courts must carefully scrutinize an officer's stated reason for detaining an individual beyond the purpose of a traffic stop to ensure that the reasons rise to the level of reasonable suspicion, so that the officer does not abuse his authority.

With this said, the court concluded that Bailey's behavior immediately following the traffic stop in conjunction with the surrounding circumstances independently established reasonable suspicion to justify his detention beyond the effectuation of his traffic stop. Under *Terry*, a law enforcement officer may briefly stop and detain an individual for investigative purposes if he has a reasonable suspicion supported by articulable facts that criminal activity may be afoot even if he lacks probable cause.

The officers noticed that Bailey kept reaching into the floor board of his vehicle following the initial stop. Bailey's behavior made the officers nervous because the officers knew that Bailey was known to carry weapons and had previously made threats on one of the officer's life. The stop was made in a location of known criminal activity at 1:00 a.m. The court concluded that given the totality of the circumstances, the officers had reasonable suspicion to detain Bailey following the initial stop of his car.

The court next found that the degree of intrusion into Bailey's personal security was reasonably related in scope to the situation at

hand, which the court judged by examining the reasonableness of the officers' conduct given their suspicions and the surrounding circumstances. Officer Davidson ordered Bailey out of the car and detained him for less than two minutes until the arrival of the drug canine. Officer Davidson did not restrain Bailey or pat him down after he got out of the car.

Consequently, the court held that the detention of less than two minutes was not an unreasonable intrusion considering Bailey's potentially threatening behavior. In sum, the 6<sup>th</sup> Circuit reversed the district court's order granting Bailey's motion to suppress physical evidence.

***United States v. Rodriguez***, 301 F.3d 592 (6<sup>th</sup> Cir. 2002).

Rodriguez entered a bank in Johnson City, Tennessee carrying a styrofoam sandwich box. Although the box was small, a teller saw Rodriguez holding it with both of his hands. Rodriguez placed the box on the writing table in the lobby of the bank and approached a teller window.

Rodriguez informed the teller that he was interested in opening a savings account. However, shortly thereafter, Rodriguez stepped away from the window and stated that he could not open the account until his wife arrived. As Rodriguez walked away, the teller informed him not to forget the box that he left on the table in the lobby.

Rodriguez returned to the teller's window a few minutes later asking her if she would cash his \$5,000 income tax refund check. After the teller told Rodriguez that she would need to get her supervisor's permission to cash a check of that large amount, he again stepped away from the window.

When Rodriguez walked up to the teller's window for a third time, he handed her a note that read "I want 5000 in case [sic] I have gun and a bom [sic] don't do anything stupid and no alarms or die [sic] packs the bom [sic] will go off if there is a die pack!" Rodriguez then verbally stated that he had a bomb and nodded his head toward the sandwich box that was still sitting on the table in the lobby.

The teller gave Rodriguez the money in her cash drawer and triggered the silent

alarm. Rodriguez fled the bank, leaving the sandwich box on the table. After Rodriguez left the bank, the teller called 911 and reported both the robbery and Rodriguez's bomb threat. The bank was evacuated and the authorities later discovered that the box contained nothing more than a turkey sandwich.

Rodriguez was apprehended shortly after the robbery and confessed his involvement. Rodriguez pled guilty to bank robbery in violation of 18 U.S.C. § 2113(a). The presentence report recommended a three level increase to Rodriguez's offense level pursuant to USSG § 2B3.1(b)(2)(E). This guideline provision mandates an enhancement "if a dangerous weapon was brandished or possessed" by the defendant during a robbery. To trigger an enhancement under § 2B3.1(b)(2)(E), the dangerous weapon needs to only appear to be dangerous.

Rodriguez objected to the sentencing application and argued that an enhancement under § 2B3.1(b)(2)(E) was unwarranted because no reasonable individual would have concluded that the sandwich box contained a bomb. The district court rejected Rodriguez's argument and applied the enhancement. Rodriguez then filed a timely notice of appeal.

The 6<sup>th</sup> Circuit applied an objective standard in determining whether an object may be considered to be a "dangerous weapon" for purposes of applying the § 2B3.1(b)(2)(E) enhancement. The court ruled that the district court did not err in finding that the styrofoam sandwich box could have been reasonably regarded as a dangerous weapon; namely, a bomb. The fact that the box neither had wires protruding out of it nor made any noise did not convince the 6<sup>th</sup> Circuit that a reasonable person would not have considered it to be a bomb.

Instead, the court focused on Rodriguez's convincing performance during the robbery. Under the circumstances, the court ruled that a bank teller would have a reasonable basis to believe that the box contained a bomb. Accordingly, the judgment of the district court was affirmed.

***United States v. Cooper***, 302 F.3d 592 (6<sup>th</sup> Cir 2002).

Cooper was convicted of being a felon in possession of a firearm in violation of 18

U.S.C. § 922(g). The government sought application of 18 U.S.C. § 924(e) (The Armed Career Criminal Act) which is a sentencing enhancement requiring the imposition of a mandatory minimum sentence of 15 years for any defendant convicted of violating § 922(g) and who has at least three prior convictions for “violent felonies.”

To support its argument for the application of the sentencing enhancement, the government pointed to Cooper’s four prior felony convictions: a 1972 breaking and entering conviction; a 1974 breaking and entering conviction; a 1978 attempted aggravated burglary conviction; and a 1978 burglary conviction.

Each of the four convictions were violations of Ohio law. At Cooper’s first sentencing hearing, the district court refused to apply § 924(e) after finding that the government failed to meet its burden of showing that the convictions were “violent felonies,” as that term was construed by the Supreme Court. The government appealed, and the 6<sup>th</sup> Circuit vacated and remanded the case for re-sentencing after concluding that there remained unresolved issues of fact.

Once the case was remanded, the government introduced the indictments for Cooper’s prior convictions to show that the crimes met the definition of “violent felonies.” However, the district court again refused to apply § 924(e) after concluding that the government had proven only two of the four convictions were violent felonies. The government again appealed to the 6<sup>th</sup> Circuit.

The term “violent felonies” means “any crime punishable by imprisonment for a term exceeding one year. . . that--(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.”

The term burglary has been interpreted to mean any conviction, regardless of its label, “having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with the intent to commit a crime.” Where a state burglary statute defines a crime more broadly by, for

instance, eliminating the requirement that the entry be of a building, permitting conviction for the entry of an automobile, a booth, a boat, or a tent, the court may still apply the enhancement if the jury found all the elements of the generic burglary definition adopted by the Supreme Court present in the offense.

Thus, where an indictment charged only one theory of the offense-the defendant entered into a building-and the jury found the defendant guilty, the jury must have found that the defendant entered into a building, rather than a boat or a car. In such a case, the sentencing court could properly find that a defendant had been convicted of a burglary as that term is used in § 924(e)(2)(B)(ii).

Moreover, even if the government cannot show that a prior conviction was for a burglary, the enhancement might still apply if the conviction “otherwise involved conduct that presents a serious potential risk of physical injury to another.” In determining whether the “otherwise” clause applies, a categorical approach must be applied.

Instead of examining the conduct of the individual defendant, the court must examine the statute defining the crime for which the defendant was convicted. If the statute generally proscribes conduct that presents a serious potential risk of physical injury to another, then the “otherwise” clause of § 924(e) applies. This result is mandated even if there exists a possibility that the statute could potentially encompass conduct which did not actually create a serious risk of injury to another person.

The district court concluded that Cooper’s 1972 and 1974 breaking and entering convictions were violent felonies because Cooper was charged with breaking and entering into dwellings. Because Ohio’s breaking and entering statute was broadly worded, the 6<sup>th</sup> Circuit applied the “categorical approach” and concluded the district court’s reasoning was correct.

The district court determined that Cooper’s attempted aggravated burglary conviction was not a violent felony because attempted aggravated burglary under Ohio law did not require conduct that presented a serious potential for physical injury. The 6<sup>th</sup> Circuit rejected the district court’s analysis

and recognized that it had previously found that the crime of attempted burglary under Ohio law was a crime involving “conduct that presents a serious potential risk of physical injury to another, and therefore met the otherwise clause of § 924(e).”

Because the 6<sup>th</sup> Circuit had previously ruled that the crime of attempted burglary categorically met the “otherwise” clause, then logic dictated that a conviction for attempted aggravated burglary also categorically met the “otherwise” clause. As a result of the 6<sup>th</sup> Circuit’s finding that the two breaking and entering and the attempted aggravated burglary convictions were violent felonies, the court did not address Cooper’s 1978 burglary conviction. Accordingly, the case was remanded to the district court for the application of the Armed Career Criminal Act enhancement.

*Scott v. Elo*, 302 F.3d 598 (6<sup>th</sup> Cir. 2002).

In 1994, Scott killed 21 year old Tyrone Williams while they and James Crain were driving in Williams’ car. Crain testified that before the shooting, he overheard Scott say that he could rob Williams. Without warning, Scott, who was riding in the back of the car, pulled a gun and shot Williams in the head. After Scott climbed from the back of the vehicle into the driver’s seat, Crain jumped out of the car and Scott sped away.

Crain called 911 from a relative’s house and told the operator what happened. After Scott was arrested, he was interviewed and admitted that he shot Williams in the head. Scott indicated that after Crain jumped out of the car, he continued to drive and threw the gun out of the car five houses from where the shooting occurred.

Scott was convicted of first degree murder, he was sentenced, and he then filed a direct appeal. One issue raised on direct appeal was the appropriateness of the prosecutor’s closing argument.

In evaluating this alleged error, it was discovered that a Rosemary Woods wantabe was the court reporter at the trial as the trial transcript omitted 18 minutes of the prosecutor’s closing argument, some of which Scott alleged was objectionable. The Michigan Court of Appeals remanded the case

to the trial court to conduct a hearing to reconstruct the record.

Consequently, the case was remanded to the trial court which held a hearing to determine what happened during the missing portion of the prosecutor’s closing argument. At the hearing, Scott’s counsel testified that he could not remember exactly what was said during the closing argument. Predictably, the prosecutor gave his sanitized version of his closing.

After the transcript was reconstructed, Scott argued that the prosecutor’s closing argument deprived him of a fair trial. The Michigan Court of Appeals found that Scott waived this issue by failing to object to the argument when it was made, and affirmed Scott’s convictions. The Michigan Supreme Court denied Scott leave to appeal.

Scott filed a § 2254 petition wherein he argued that the prosecutor improperly shifted the burden of proof to him during his closing argument. To support this argument, Scott pointed to the prosecutor’s statement during closing argument that “there is no evidence of heat of the moment, heat of passion, of some sudden unexplainable impulse.”

Scott maintained that this statement improperly placed the burden on him to show some evidence of a factor that would reduce the crime from first degree murder, rather than leaving the burden with the prosecutor to prove the elements of premeditation and deliberate killing beyond a reasonable doubt.

The district court concluded that because Scott’s counsel did not object to the comment, this claim was barred by procedural default, and in the alternative, it lacked merit. In the 6<sup>th</sup> Circuit, Scott contended that the district court and the Michigan Court of Appeals erred in dealing with the closing argument issue because neither court had a complete transcript of the proceedings required to determine whether Scott’s counsel objected to any statements made by the prosecutor.

The 6<sup>th</sup> Circuit concluded that the statement at issue was made during the prosecutor’s rebuttal, which was fully transcribed. The missing portion of the transcript covered the beginning of the



prosecutor's first closing argument. A review of the record of the rebuttal argument revealed that defense counsel clearly did not object at any time.

In the alternative, the 6<sup>th</sup> Circuit also ruled that even if the claim was not procedurally defaulted, the alleged error was not so severe as to deprive Scott of a fair trial. Consequently, the 6<sup>th</sup> Circuit affirmed the district court's handling of this issue.

Scott also posited that the court reporter's failure to transcribe a significant portion of the closing argument denied him due process. Scott noted that the missing portion of the transcript might conceal an objection that he may have made to an improper statement by the prosecutor. Because of defense counsel's inability to recall the closing argument, Scott argued that the resolution of this issue was left to the mercy of the prosecutor's notes and memory which yielded nothing that would assist Scott.

In *Mayer v. Chicago*, 404 U.S. 189 (1971), the Court found that due process requires that a defendant be given a reliable record of sufficient completeness to permit proper review of his claims. However, the 6<sup>th</sup> Circuit held that *Mayer* did not stand for the proposition implicit in Scott's argument, that "where a portion of a trial transcript is missing and unobtainable, and where a defendant makes a claim that could possibly implicate that portion of the transcript, a retrial is always necessary."

Instead, the 6<sup>th</sup> Circuit held that federal habeas relief based on a missing transcript will only be granted when the petitioner can show prejudice. In this case, Scott offered nothing more than gross speculation of error in the missing portion of the transcript. Scott baldly alleged that the prosecution **might** have made some improper comments. Moreover, Scott contended that his attorney **might** have objected to one specific statement that Scott identified as improper.

However, the 6<sup>th</sup> Circuit rejected this argument because even assuming that Scott was right, he showed no prejudice as a result of the statement that the prosecutor made or as a result of the transcript error. Consequently, the court affirmed the denial of habeas relief.

*United States v. Modena*, 302 F.3d 626 (6<sup>th</sup> Cir. 2002).

This case arises from the efforts of the five Russell brothers to avoid paying federal income taxes. To accomplish this end, the Russells purchased sham trusts that they used to hide their income. Modena helped set up and administer these trusts. The Russell brothers and Modena were all charged in the same indictment. However, the Russell brothers were all convicted and sentenced prior to Modena's arrest.

At a pretrial conference, Modena informed the magistrate judge that he was proceeding *pro se*. The magistrate judge engaged Modena in a colloquy to ensure that Modena understood the consequences of his decision to have an idiot for a client.

Modena indicated that he appreciated and accepted the difficulties inherent in self-representation. Based on Modena's answers and demeanor, the magistrate judge concluded that Modena "knowingly and voluntarily waived his right to counsel." Nonetheless, the magistrate judge appointed standby counsel in the event that Modena changed his mind.

Five days later, Modena sent a letter to the court requesting the assistance of appointed counsel. Three days later, Modena withdrew this request in a letter that he sent to the court.

At the final pretrial conference before the district court, Modena again stated his desire to represent himself. The district court permitted Modena to proceed *pro se* without further inquiry. Modena was tried by a jury and during the course of the trial, the government called 30 witnesses and offered more than 200 exhibits. Modena sat silent throughout the entire trial, raising no objections and presenting no defense in his behalf. The jury convicted Modena of conspiracy to defraud the United States.

Modena was dissatisfied with his performance as counsel; so after the trial, he requested the assistance "of a more qualified attorney in tax-related matters during the sentencing proceedings."

Subsequently, Modena received a letter from the district court informing him that appointed counsel had already been provided to render any assistance that he

might need. Modena was sentenced to serve 60 months in prison and three years of supervised release. After sentence was imposed, a timely notice of appeal was filed.

Modena contended that the district court erred in concluding that he knowingly and voluntarily waived his right to counsel. However, because this argument was raised for the first time on appeal, the 6<sup>th</sup> Circuit reviewed it for a plain error. To establish plain error, a defendant must show that: (1) an error occurred in the district court; (2) the error was plain; (3) the error affected the defendant's substantial rights; and (4) this adverse impact seriously affected the fairness, integrity or public reputation of the judicial proceedings.

Before allowing a criminal defendant to represent himself, a district court is obligated to conduct a colloquy with the defendant consisting of several questions that are designed to gauge the defendant's understanding of the legal proceedings, to assess his willingness to shoulder the consequences of proceeding *pro se*, and to urge him to accept the assistance of appointed counsel.

After the colloquy, the district court must make a finding that the defendant has knowingly and voluntarily waived his right to counsel. In this case, the magistrate judge conducted the required colloquy and concluded that Modena knowingly and voluntarily waived his right to counsel.

However, Modena argued that the district court had an obligation to conduct the waiver-of-counsel colloquy a second time after Modena expressed doubts about representing himself prior to trial. The 6<sup>th</sup> Circuit rejected this argument and held that a magistrate judge was authorized by statute to determine whether a criminal defendant has effectively waived his right to counsel. The magistrate judge in this case exercised this authority and followed the procedures required by the 6<sup>th</sup> Circuit. Although Modena had an change of heart regarding his decision to proceed *pro se*, he ultimately gave the district court no reason to suspect that he was uncertain about representing himself.

Next, Modena maintained that the admission of testimony regarding the Russell

brothers' convictions deprived him of a fair trial. During direct examination, the prosecutor questioned Daniel Russell as to whether he and his brothers were convicted. Daniel acknowledged that all of the brothers were convicted; however, Modena failed to object to the government's line of questioning.

Evidence that a coconspirator has been convicted is generally inadmissible because it might lead the jury to regard the issue of the remaining defendant's guilt as settled and conclude that the trial is a mere formality. When a co-conspirator testifies, evidence of his prior convictions may be introduced so that the jury can accurately assess his credibility. However, the district court must instruct the jury that it may not consider the co-conspirator's conviction as evidence of the defendant's guilt.

The 6<sup>th</sup> Circuit held that the prosecutor was entitled to question Daniel Russell about his prior conspiracy conviction in order to "remove the sting" of any attempt to impeach his credibility with his prior conviction. However, the district court failed to issue a cautionary instruction after the conviction was acknowledged.

The 6<sup>th</sup> Circuit found that because this issue was reviewed for plain error, Modena was obligated to establish that the admission of this testimony effected the outcome of his trial. The court ruled that the government offered ample evidence to establish Modena's guilt beyond a reasonable doubt. The strength of the government's case made it highly unlikely that the admission of the testimony about Daniel's conviction had any effect on the jury's verdict and was not plain error.

Modena next challenged the admission of several evidentiary summaries that were introduced by the government. There are five requirements for the admission of an evidentiary summary: (1) the underlying documents must be so voluminous that they cannot be conveniently examined by the court; (2) the proponent of the summary must have made the documents available for examination or copying at a reasonable time and place; (3) the underlying documents must be admissible in evidence; (4) the summary must be accurate and non-prejudicial; and (5) the summary must be properly introduced through

the testimony of a witness who supervised its preparation.

The main bone of contention was whether the government made available to Modena the underlying documents for examination and copying. The government contended that it filed a “Statement of Discovery” that informed Modena that “upon request, it would make any records intended for use at trial available for inspection.” However, Modena never made a request.

The 6<sup>th</sup> Circuit found that Fed. R. Evid. 1006 “operates independently of the discovery rules.” As a result, the government had a duty to state when and where the documents supporting its summaries could be viewed, without regard to whether Modena made a request for these records.

Consequently, the 6<sup>th</sup> Circuit ruled that the district court erred in admitting the challenged summaries into evidence. However, because Modena failed to object to their admission, this issue was again reviewed for plain error. Because of the overwhelming evidence of Modena’s guilt, the court concluded that plain error did not occur.

Modena next contended that the prosecutor engaged in misconduct during his closing argument. Modena maintained that the prosecutor “vouched for” several of the government’s witnesses, pressured the jury to return a guilty verdict, and exhorted the jury to “send a message” with its verdict. However, because of Modena’s failure to object, these arguments were reviewed for plain error.

In reviewing a claim of prosecutorial misconduct under the plain error standard of review, the 6<sup>th</sup> Circuit must first determine whether the statements at issue were improper. If they were improper, the court must decide whether they were sufficiently flagrant to warrant reversal of the defendant’s conviction despite his failure to object at trial.

A prosecutor cannot improperly vouch for the credibility of his witnesses. Improper vouching occurs when a jury could reasonably believe that the prosecutor was indicating a personal belief in the witnesses’ credibility. In this case, the prosecutor made several vague statements to the effect that several witnesses were no longer protesting the federal income tax. These statements, by themselves, were

not indicative of the prosecutor’s personal view as to the witnesses’ credibility.

However, the prosecutor also shared with the jury his evaluation that Daniel Russell was now a “law-abiding man.” A law-abiding man does not commit perjury. The prosecutor’s description of Daniel implicitly conveyed to the jury the prosecutor’s belief that Daniel was a credible witness. The 6<sup>th</sup> Circuit held that such vouching was impermissible.

Modena also claimed that the prosecutor improperly pressured the jury to return a guilty verdict by stating “I think we can all take some measure of satisfaction in the investigation and prosecution of the Russells and Modena. But we’re not finished. We’re not finished until this verdict is returned.” Statements that exhort the jury to “do its job” are improper and the court found that the above-quoted argument could be construed as pressuring the jury to help the government to finish its goal of bringing Modena to justice. The court concluded that this kind of pressure “has no place in the administration of criminal justice.”

Because the court found that the prosecutor had improperly vouched for the credibility of at least one witness and pressured the jury to return a guilty verdict, the question became whether the prosecutor’s statements were so flagrant as to warrant reversal. In making this determination, the court evaluated whether the (1) conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) conduct or remarks were isolated or extensive; (3) remarks were deliberately or accidentally made; and (4) evidence against the defendant was strong.

The court held that the prosecutor’s remarks did not mislead the jury; however they did prejudice Modena by both implicitly vouching for the testimony of Daniel Russell and by improperly pressuring the jury to find Modena guilty. The court next found that the remarks were isolated but that they were intentionally made. Finally, the court ruled that the evidence against Modena was substantial.

In evaluating the relevant factors, the court concluded that they did not favor either

the government or Modena. However in the end, the court concluded that Modena did not sustain his burden of proving that the prosecutorial misconduct was so “exceptionally flagrant that it constituted plain error.”

The final issue raised in this appeal was the propriety of the special conditions of supervised release imposed by the district court. As part of his conditions of supervised release, the district court ordered Modena to “receive testing and treatment for drug and alcohol abuse and to abstain from the use of alcoholic beverages during his three-year term of supervised release.”

The 6<sup>th</sup> Circuit held that a district court may impose “special” conditions of supervised release that it deems appropriate. Moreover, the imposition of a special condition of supervised release is not an abuse of discretion if that condition is “reasonably related to the dual goals of probation, the rehabilitation of the defendant, and the protection of the public.”

Modena argued that the district court abused its discretion by imposing the special conditions of supervised release in this case. Neither alcohol nor drug abuse played a role in Modena’s crime. Moreover, the record did not indicate that Modena had a substance abuse problem. Consequently, the 6<sup>th</sup> Circuit ruled that the special conditions of supervised release did not form a reasonable relationship to either rehabilitating Modena or protecting the public. Consequently, Modena’s sentence was vacated and the case was remanded with instructions to the district court to resentence Modena without the special conditions of supervised release.

*United States v. Tocco*, —F.3d—, 2002 WL 2030825 (6<sup>th</sup> Cir. 2002).

In 1996, Tocco and 16 other individuals were indicted in a case involving the alleged illegal activities of the “Detroit *La Cosa Nostra* Family.” According to the indictment, Tocco was the boss of the family and he was involved in conspiracy, extortion, and attempted extortion. A jury convicted Tocco of conspiracy to violate the RICO statute, conspiracy to collect an unlawful debt in violation of the RICO statute, and conspiracy to interfere with commerce by

extortion in violation of the Hobbs Act.

A presentence report was prepared in which Tocco’s offense level was determined to be 22. However, the presentence report also set forth numerous factors that “may warrant a departure.” The district court adopted the factual findings and guideline applications contained in the presentence report. Additionally, the court also departed down ten levels because of Tocco’s extraordinary community service involvement and the age and health conditions of Tocco and his wife.

Tocco was sentenced to serve twelve months and a day imprisonment and he appealed. However, the government cross-appealed the sentence imposed.

In a prior opinion, the 6<sup>th</sup> Circuit affirmed Tocco’s conviction but vacated his sentence and remanded the case for resentencing. In that opinion, the 6<sup>th</sup> Circuit found that the district court committed clear error in concluding that Tocco did not have a supervisory role in the conspiracy. Consequently, on remand, the district court was instructed to apply an aggravated role enhancement pursuant to U.S.S.G § 3B1.1 to Tocco’s offense level.

Moreover, in the prior opinion, the 6<sup>th</sup> Circuit addressed the district court’s ten level downward departure and held that “based on our conclusion that the district court must revisit the sentence imposed upon remand, we further instruct the court to reconsider its decision to depart from the guideline range once that range has been redetermined.”

On remand, the district court found that Tocco was not an “organizer, leader, manager, or supervisor of the gambling operation.” Consequently, the court refused to apply an aggravating role enhancement. The court sentenced Tocco to serve 34 months imprisonment and it arrived at this sentence after finding that Tocco’s total offense level was 24. The court then departed downward four levels for Tocco’s “extraordinary community service” but it refused to depart based on the health problems that Tocco and his wife were experiencing. Both the government and Tocco appealed these sentencing determinations.

The first issue considered by the 6<sup>th</sup>

Circuit was whether the district court erred by failing to apply an aggravating role enhancement to Tocco's offense level after the case was remanded. In the first opinion issued by the 6<sup>th</sup> Circuit, the court found that "from a review of the record the district court committed a clear error in concluding that Tocco did not have a supervisory role in this case." Consequently, the court instructed the district court, on remand, to apply an aggravating role enhancement to Tocco's offense level.

The 6<sup>th</sup> Circuit ruled that the district court erred in not applying the enhancement on remand. In its prior opinion, the court made factual findings on how Tocco's activities justified the application of the enhancement. Consequently, under the law of the case doctrine, the 6<sup>th</sup> Circuit could not now reconsider determinations made by the court at a prior state of the litigation.

Instead, because the court had previously held that the district court clearly erred in concluding that Tocco's activities were not reasonably foreseeable acts in furtherance of the RICO conspiracy, the district court and the 6<sup>th</sup> Circuit were bound by those determinations. Consequently, the district court was again instructed on remand to applying an aggravating role enhancement to Tocco's base offense level.

In his appeal, Tocco argued that on remand, the district court should have departed downward from the sentencing range based on the health problems with which he and his wife were afflicted. This argument is predicated on Tocco's view that the 6<sup>th</sup> Circuit's previous remand to the district court was "limited."

The 6<sup>th</sup> Circuit agreed with Tocco that the court's prior remand was limited; however, it did not agree that the remand limited the district court's ability to consider its decision to depart downward based on Tocco's and his wife's health. Limited remands explicitly outline the issues to be addressed by the district court and create a narrow framework within which the district court must operate. In contrast, "general remands give district courts authority to address all matters as long as remaining consistent with the remand."

In its limited remand, the 6<sup>th</sup> Circuit instructed the district court to "reconsider its decision to depart from the guideline range once that range has been redetermined." However, the court did not instruct the district court not to depart on the basis of Tocco's and his wife's health. Instead, the district court was merely informed that this type of departure was strongly discouraged. Consequently, the district court's refusal to depart downward at resentencing on the basis of Tocco's and his wife's health was not outside the scope of the limited remand.

Instead, on remand, the district court concluded that the downward departure on the basis of Tocco's and his wife's health was unwarranted. Where a district court finds that a requested downward departure was unwarranted, it implicitly recognized its discretion to depart downward. Consequently, the decision of the district court to depart downward was not subject to appellate review. Accordingly Tocco's sentence was vacated and the case was remanded with explicit instructions that Tocco's total offense level must be at least 25.

*United States v. Copeland*, —F.3d—, 2002 WL 31010969 (6<sup>th</sup> Cir. 2002).

Copeland and Hartwell were indicted in a multi-count drug indictment but the indictment did not allege any drug quantities. Prior to trial, both Copeland and Hartwell moved to suppress evidence seized from their vehicle. At a suppression hearing, two Michigan State Troopers testified that at approximately 1:00 A.M. on June 30, 1999, they observed the Defendants inside a vehicle with its parking lights on. However, the vehicle was parked on the wrong side of the road at a 45 degree angle to the curb.

The troopers testified that they intended to stop the Defendants in order to issue the driver a parking citation. However, while the officers were halted at the stop sign a short distance from the Defendants' vehicle, the Defendants pulled away from the curb and resumed driving at the legal speed limit.

The troopers followed the Defendants' vehicle but did not activate their beacon lights. After following the car for approximately one mile, the troopers activated their lights and stopped the Defendants. The troopers smelled

alcohol and observed it in plain view. Hartwell was arrested and both Defendants and the vehicle were searched. During this search, the troopers recovered two stolen firearms and a sheet of paper containing drug tabulations in Hartwell's handwriting.

The officers issued traffic citations for improper parking and possessing an open container. Both Defendants were arrested for transporting an open container. Hartwell and Copeland argued that the troopers lacked probable cause to stop their vehicle; therefore, the brief detention of the vehicle constituted an unreasonable stop in violation of the 4<sup>th</sup> Amendment.

The temporary stop and detention of a vehicle and its passengers, even for a brief period of time can constitute an unreasonable seizure under the 4<sup>th</sup> Amendment. A police officer's stop of a vehicle must be reasonable under the circumstances. This reasonableness requirement is satisfied where the government's interest in conducting the stop outweighs an individual's privacy interests. Under this framework, an automobile stop is considered reasonable where the police have probable cause to believe that a traffic violation has occurred.

Probable cause is defined as reasonable grounds for belief, supported by less than *prima facie* proof but more than mere suspicion. In determining whether probable cause exists, the court must examine the totality of the circumstances from the perspective of the officer at the time of the incident.

Hartwell and Copeland maintained that the stop of their vehicle for a completed parking violation was unreasonable and therefore the officers' lacked probable cause. In contrast, the government posited that parking regulations are encompassed within Michigan's traffic laws and thus the observation of a parking violation constituted probable cause to conduct a stop. The district court agreed with the defendants that a parking violation, in and of itself, would not provide a reasonable police officer with probable cause to believe that a person had committed a traffic offense. Consequently, the court found the stop of the vehicle was unreasonable.

The 6<sup>th</sup> Circuit first determined whether the district court erred in concluding that the observed parking violation did not constitute probable cause. In cases involving traffic violations, the probable cause standard is satisfied in three different contexts. First, in the largest class of cases, the police officer develops probable cause to stop a vehicle based upon an observed moving violation. Second, the probable cause standard is satisfied when an officer observes a vehicle, either in motion or while stopped, that does not comply with the appropriate registration requirements. Finally, an officer has probable cause to stop a driver in the course of a parking violation.

However, the question presented in this case was whether the apprehension of the Defendants, after they had parked illegally, was a reasonable stop. The 6<sup>th</sup> Circuit disagreed with district court's conclusion that a parking violation, by itself, did not constitute adequate grounds to stop a vehicle because it was not a traffic violation.

Instead, the 6<sup>th</sup> Circuit ruled that the placement of the Defendants' vehicle at a 45-degree angle to the curb, facing in the wrong direction clearly violated Michigan's parking regulations. This parking regulation was set forth in the general traffic laws of the Michigan Vehicle Code which permits officers to enforce any of the regulations in this section by virtue of a stop.

Consequently, the court held that an officer could effect a stop based upon the driver's failure to comply with Michigan's parking regulations even if the vehicle was no longer parked. Even though an officer could effect a stop of a vehicle for parking illegally, that stop is nonetheless subject to the general reasonableness requirement. When an officer is in possession of information that creates the basis for probable cause, he is required to act upon this information within a reasonable period of time; otherwise, the existence of probable cause becomes stale.

The court found that the stop of the Defendants one mile from their parked location was reasonable. Upon observing the Defendants' illegally parked, both officers testified that they investigated the situation further and pursued the vehicle. In sum, the

6<sup>th</sup> Circuit found that the search and seizure in this case was reasonable.

Both Hartwell and Copeland went to trial and were convicted of all counts. At the trial, the government sought to introduce Copeland's three prior arrests for drug possession all of which took place during the course of the charged conspiracy. The first arrest involved 6.13 grams of powder cocaine; the second arrest involved 2.16 grams of powder cocaine at which time Copeland was also in possession of a weapon; and the third arrest involved Copeland's possession of marijuana and \$463.00 in cash.

Copeland filed a motion *in limine* seeking to exclude this evidence on the basis of Fed.R.Evid. 404(b). Copeland argued that the amounts involved in these arrests were not consistent with distribution and that the introduction of these prior bad acts would unfairly prejudice him. However, the district court disagreed and held that the arrests were probative of Copeland's involvement in the conspiracy.

To determine the admissibility of prior bad acts under Fed.R.Evid. 404(b), the district court must examine three factors. First, the court must decide "whether there is sufficient evidence that the other act in question occurred. Next, the court must determine whether the prior acts are probative of a material issue other than character. Finally, the court must assess whether the probative value of the evidence is outweighed by the prejudicial impact that it may have on the jury."

The 6<sup>th</sup> Circuit applied this framework to this case and concluded that the district court did not abuse its discretion in finding that Copeland's prior arrests could be admitted to prove his involvement in the conspiracy. The court ruled that Copeland's repeated arrests for drug possession, especially with the presence of a firearm and significant amounts of cash, were relevant to the question of whether he knowingly and voluntarily participated in a conspiracy. Accordingly, the 6<sup>th</sup> Circuit ruled that the district court did not err in admitting this evidence.

At the trial, the government sought to introduce testimony from an inmate with whom the Defendants shared a jail cell prior

to trial. The inmate apprised the government that he overheard the Defendants discussing a plan to pay someone \$500.00 to harm the Assistant United States Attorney who was prosecuting their case. The Defendants moved to exclude these statements as non-probative of guilt under Fed.R.Evid. 404(b). In the alternative, the Defendant's sought to exclude the evidence as unfairly prejudicial under Fed.R.Evid. 403. The district court denied the Defendants' motions after finding that the statements constituted evidence of spoliation.

On appeal, Copeland conceded that the evidence had some probative value. However, Copeland maintained that the evidence was extremely prejudicial. Spoliation is the intentional destruction of evidence that is presumed to be unfavorable to the party responsible for its destruction. Threats made against government witnesses or testifying co-defendants constitute evidence of spoliation.

The government urged the extension of the spoliation doctrine to the Defendants' threats against the prosecutor. The government maintained that such threats were probative of an attempt to tamper with the government's case. The 6<sup>th</sup> Circuit rejected this argument because threats against a prosecutor do not imply a defendant's intention to destroy evidence. Unlike a government witness, a prosecutor does not possess specific knowledge about the defendant's acts to which he can testify under oath.

Instead, the connection between the prosecutor assigned to prosecute the case and the substance of the government's case is attenuated. Consequently, threats to harm or kill a prosecutor are not probative of a defendant's intention to lessen any portion of the government's burden at trial.

Even though the Defendants' statements were not admissible as evidence of spoliation, they were admissible because they were relevant under Fed. R. Evid. 401. Evidence that has the tendency to demonstrate a defendant's consciousness of wrongdoing is admissible to establish the defendant's guilt. The 6<sup>th</sup> Circuit concluded that the Defendants' threats fell within this category of statements.

The court then subjected these

statements to the Rule 403 balancing test and concluded that these statements would cast an extremely negative light upon the character of the Defendants. The statements would have a tendency to cause the jury to make impermissible inferences, including the fact that the Defendants possessed a violent nature and had previously served time in prison.

Given this imbalance, the 6<sup>th</sup> Circuit ruled that the district court abused its discretion in determining that the prejudicial effect of the Defendants' threats were substantially outweighed by their probative value. With this said, the court also found that this error was harmless given the overwhelming evidence of the guilt of the Defendants.

The next issue considered by the 6<sup>th</sup> Circuit was Copeland's argument that the government's use of a peremptory challenge to exclude a Hispanic juror violated his rights under *Batson v. Kentucky*, 476 U.S. 79 (1986). The Hispanic juror indicated during *voir dire* that he was involved in a personal injury lawsuit and would need to attend a settlement conference during the trial.

When that juror was excused, Copeland did not object. However, at the close of *voir dire*, Copeland demanded that the government proffer "some reasonable explanation" as to why the juror was excused.

The government responded that Copeland waived any objection but nonetheless stated that the juror was excused because of his perceived inattentiveness and his preoccupation with his personal injury law suit. The district court found this explanation to be race-neutral and proceeded with jury selection.

Under *Batson*, once the opponent of a peremptory challenge has made a *prima facie* case of racial discrimination, the burden shifts to the government to demonstrate a race-neutral reason for the exclusion of the juror. The government is not required to persuade the court that its reasons for dismissing the juror were well-founded; rather, it need only demonstrate that its reasons were race neutral.

Once the government offers a race-neutral justification, the challenging party must demonstrate that the purported explanation was merely a pretext to justify the

excuse of the juror. The burden of persuasion always rests with the opponent of the challenge.

The 6<sup>th</sup> Circuit ruled that Copeland failed to show that the government's motive in striking the Hispanic juror was discriminatory. The government proffered a race-neutral justification for dismissing the juror; however, Copeland failed to counter this proffer. Consequently, the court rejected Copeland's *Batson* challenge.

The next issue raised was whether the sentences imposed on Hartwell and Copeland violated *Apprendi v. New Jersey*, 533 U.S. 466 (2000). In *Apprendi*, the Supreme Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

The counts of the indictment charging violations of federal narcotics laws did not allege drug quantities and the jury made no such finding beyond a reasonable doubt. Nonetheless, the district court sentenced Copeland to serve 30 years in prison while Hartwell was the recipient of a life sentence.

Both Hartwell and Copeland had prior felony drug convictions and they maintained that because the indictment did not allege a drug quantity, the maximum sentence to which they could be sentenced would be 30 years under the default provision found in § 841(b)(1)(C).

A defendant's rights under *Apprendi* are not offended where a fact, that is not proved beyond a reasonable doubt, increases his mandatory minimum sentence but does not increase the maximum statutory range. Consequently, the 6<sup>th</sup> Circuit agreed that where drug quantity is not proved beyond a reasonable doubt, a defendant's sentence cannot exceed the statutory range set forth in § 841(b)(1)(C).

At the trial in this case, different witnesses testified about the amount of drugs that they purchased from or distributed with the Defendants. However, the question of drug quantity was never submitted to the jury. The presentence investigation reports that were prepared in both cases recommended that the Defendants be sentenced pursuant to



§ 841(b)(1)(A) at the sentencing hearing.

Both Copeland and Hartwell made written and oral objections under *Apprendi*. However, the district court rejected this argument and concluded that *Apprendi* did not apply to mandatory minimum sentencing schemes. The court imposed a sentence in both cases consistent with the sentencing ranges found in § 841(b)(1)(A) because the record established “by overwhelming evidence” that there were five grams or more of crack as part of the conspiracy.

Copeland insisted that he should have been sentenced to the lowest tier of the statutory scheme, § 841(b)(1)(C), because the drug quantity was not determined by the jury beyond a reasonable doubt. The government countered that because Copeland’s 30 year sentence was within the statutory maximum of § 841(b)(1)(C), the sentence did not violate *Apprendi*.

The 6<sup>th</sup> Circuit concluded that because Copeland was not sentenced beyond the statutory range of § 841(b)(1)(C), the fact that the district court sentenced him based on factual findings not proved beyond a reasonable doubt did not rise to a constitutional violation under *Apprendi*. In reaching its verdict, the jury authorized the district court to impose a sentence of up to thirty years under § 841(b)(1)(C) and the district court considered drug quantities established by a preponderance of the evidence to subject Copeland to a mandatory minimum sentence. However, the imposition of a mandatory minimum sentence was irrelevant because the district court’s sentence remained within the sentencing range of § 841(b)(1)(C). Accordingly, the 6<sup>th</sup> Circuit found no error in the sentence imposed.

The district court sentenced Hartwell to life in prison under § 841(b)(1)(B). Hartwell challenged the constitutionality of this sentence urging that because drug quantity had not been proved beyond a reasonable doubt, he should have been sentenced pursuant to the lowest tier of statutory scheme, § 841(b)(1)(C), which provides a range of up to thirty years imprisonment. The 6<sup>th</sup> Circuit agreed with Hartwell’s argument and found that because the sentence imposed exceeded the maximum contained within §

841(b)(1)(C), he had established an *Apprendi* violation.

The court next determined whether this error was harmless. The court parsed the record and concluded that the government adduced sufficient evidence from which a jury most certainly would have found, beyond a reasonable doubt, that Hartwell was responsible for conspiring to distribute five or more grams of crack. Consequently, the Sixth Circuit ruled that Hartwell’s rights were not affected substantially by the error and the sentence was affirmed.

*United States v. Yeager*, —F.3d—, 2002 WL 31015479 (6<sup>th</sup> Cir. 2002).

Yeager was employed as an assistant branch manager at a bank between 1994 to 1996. As a result of certain loans that he approved, Yeager was indicted for nine counts of bank fraud. As a part of pretrial discovery, Yeager’s lawyer requested and moved for the production of the loan applications, credit reports, and audit reports relating to the loans that Yeager authorized.

The AUSA assigned to this case repeatedly represented to the district court, Yeager’s counsel, and the grand jury that many of the documents that Yeager requested were unavailable or did not exist. Rather than stand trial, Yeager entered a plea agreement in which he pled guilty to two counts of bank fraud in return for a dismissal of the remaining seven charges.

Two days before Yeager’s sentencing, the government informed defense counsel that it was in possession of certain previously requested documents. Over the next several months, the government produced additional documents to Yeager, including audit reports, that were in the AUSA’s possession for the duration of the litigation.

Believing that the government violated its duty to produce evidence favorable to the defendant under *Brady v. Maryland*, 373 U.S. 83 (1963), as well as its duty to produce requested documents within its possession, custody, or control, Yeager filed a motion to dismiss the indictment with prejudice under Fed. R. of Crim. P. 16(d)(2).

In response to Yeager’s motion, the district court conducted an evidentiary hearing to ascertain whether the alleged discovery

abuses took place. Based upon the hearing, the district court concluded that the government had several of the requested documents in its possession throughout the pendency of the case.

Moreover, the district court ruled that the government made several false statements regarding the documents in its possession, to Yeager, the court, and the grand jury. Additionally, the district court concluded that the government conducted “discovery with negligence amounting to deliberate indifference.”

The district court determined that the government did not commit a *Brady* violation because the documents were not within its exclusive control. Nevertheless, the district court concluded that the government violated Fed. R. Crim. P. 16(a)(1)(C) as a result of not producing the requested documents in its possession, custody, or control. Based on that violation, the district court sanctioned the government for its discovery abuses and dismissed the indictment without prejudice.

Because a dismissal without prejudice allowed for the possibility that Yeager would be indicted, he filed a notice of appeal. After the notice of appeal was filed, Yeager was indicted for 18 counts of bank fraud.

The first question raised on appeal was whether the 6<sup>th</sup> Circuit had appellate subject matter jurisdiction over this case. For appellate jurisdiction to exist, it must be conferred by statute. The court found that 18 U.S.C. § 3742 did not provide appellate jurisdiction over Yeager’s appeal. Rather than serve as a general grant of jurisdiction over any component of a sentencing hearing, § 3742 provides appellate jurisdiction over appeals of final sentences and appeals of plea agreements that include specific sentences under Fed. R. Crim. P. 11(e)(1)(C). In this case, Yeager, neither received a final sentence nor did his plea agreement include a specific sentence. Consequently, the court ruled that § 3742 did not provide it with jurisdiction over Yeager’s appeal.

The court next examined whether appellate jurisdiction existed under 28 U.S.C. § 1291. Section 1291 cloaks appellate courts with appellate jurisdiction over “final decisions of the district courts of the United

States.” A decision is final for purposes of appeal only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution that has already been determined.

For a dismissal without prejudice to be inherently final, it must, as a practical matter, prevent the parties from further litigating the merits of the case in federal court. Before a dismissal finally disposes of a case so that it is not subject to further proceedings in federal court, the dismissal must be final and appealable. However, where the dismissal without prejudice did not prevent the government from prosecuting Yeager through another indictment, the dismissal without prejudice was not inherently a final decision.

Although a dismissal without prejudice is not inherently a final decision, it may be a final decision appealable under the collateral order doctrine. The collateral order doctrine allows immediate appeal of an order that: (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment.

The 6<sup>th</sup> Circuit concluded that Yeager’s appeal satisfied the first two prongs of the collateral order doctrine but failed the third. The first requirement was met because Yeager’s appeal would conclusively determine whether the district court erred in dismissing his case without prejudice. The second prong was also satisfied because Yeager’s appeal arose out of the government’s abuse of the discovery rules. However, Yeager could not meet the third prong because the district court’s order was reviewable through a non-interlocutory appeal. To satisfy this third prong, the lack of an immediate appeal must strip a party of its ability to preserve a right or an immunity.

The 6<sup>th</sup> Circuit identified only two situations where the collateral order doctrine permitted interlocutory criminal appeals: (1) denials of motions to dismiss on double jeopardy grounds and (2) denials of motions to reduce bail before trial. Because the merits of Yeager’s appeal were reviewable later, the third prong of the collateral order doctrine was

not satisfied. Consequently, the district court's dismissal without prejudice was not an immediately appealable collateral order. This appeal was dismissed after the 6<sup>th</sup> Circuit concluded that it did not have appellate subject matter jurisdiction.

*United States v. Green*, —F.3d—, 2002 WL 31039136 (6<sup>th</sup> Cir. 2002).

In 1990, Green was charged in a multi-count indictment alleging that he participated in a conspiracy to: commit tax evasion, violate the continuing criminal enterprise statute, and violate federal drug laws. Green and seven co-defendants went to trial in a case that was affectionately known as the "Flower Posse."

Two of the co-defendants pled guilty and testified for the government. On May 18, 1990, Green was convicted of all counts and he was released on bond pending sentencing (mistake number one). Mistake number two, Green failed to appear for sentencing on August 24, 1990 and a bench warrant issued for his arrest.

On April 26, 2000, Green was arrested in Florida where he was living under an assumed name. As a result of Green's failure to appear, an information was filed charging him with violating 18 U.S.C. § 3126. Green pled guilty to failing to appear and this case was consolidated for sentencing with the conspiracy convictions.

Green was sentenced to serve 151 months of imprisonment on the conspiracy convictions and 14 months consecutively for the failure to appear charge. Green filed a timely notice of appeal. The first issue decided by the 6<sup>th</sup> Circuit was whether the trial court erred in allowing the government to call Marvin Warner's attorney, J. Tullis Rogers, to testify at his trial.

At the trial of this case, Marvin Warner testified on direct examination that the cocaine supplier to the criminal enterprise was "Kenny Green" and he even identified Green as the supplier. On cross-examination, Green's counsel produced a letter written by Marvin Warner to his ex-wife, Robin Warner, in which he wrote: "I have heard someone named Willie Green got picked up in Florida. That was the name in the paper under your write-up. Who is that?"

The government was not aware of the

existence of the letter prior to trial. As a result, the government called Rogers to question him regarding Warner's knowledge of Green's identity. Marvin Warner gave a limited waiver of the attorney-client privilege for his attorney to testify in this regard.

On direct examination, Rogers stated that he received a phone call from Marvin Warner shortly after his arrest in which he stated that he remembered Willie's last name. Rogers then testified that he contacted the authorities to relay the information. Thus, Rogers' direct examination was confined as to how and when he first heard Marvin Warner reveal Green's identity.

During cross-examination, Rogers admitted that he had been present for part of Marvin Warner's testimony. Rogers was also asked why Warner sought his representation. The trial court refused to allow this line of questioning based on the limited waiver of the attorney-client privilege and because the question was outside of the scope of direct examination.

On appeal, Green argued that Rogers' testimony violated the witness sequestration order. Moreover, Green posited that the decision of the district court to limit Green's cross-examination of Rogers was error.

Fed. R. Evid. 615 provides that: "At the request of the party, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses." This rule serves two purposes: (1) it prevents witnesses from tailoring testimony to that of other witnesses; and (2) it aids in detecting false testimony. However, a violation of a sequestration order does not automatically bar a witness' testimony.

The 6<sup>th</sup> Circuit found no violation of the sequestration order when Rogers was permitted to testify after hearing his client's testimony. The government did not know of the existence of the letter prior to Marvin Warner's cross-examination. Therefore, the government could not have known that it was required to shield Rogers from his client's testimony. Consequently, the district court did not abuse its discretion in permitting Rogers to testify.

Moreover, the court also found that the district court properly limited Green's

counsel's questioning of Rogers about his representation of Marvin Warner because this information was outside of the scope of direct examination and would have violated Fed. R. Evid. 611, and the limited waiver of the attorney-client privilege.

The next issue considered by the 6<sup>th</sup> Circuit was Green's claim that he was deprived of a fair trial because of prosecutorial misconduct. Green alleged that in closing argument, the prosecutor urged him to explain "why" certain facts were present in the case in an attempt to improperly shift the burden of proof and to violate his constitutional right not to testify. In response, the government argued that Green's counsel did not properly object to the government's comments and that the prosecutor's comments were simply rhetorical questions for the jury to answer during deliberations.

The proper prosecutorial misconduct analysis first requires the court to examine whether the incident amounted to prosecutorial misconduct, and if so, whether it was so egregious as to warrant a new trial. The first issue that must be determined is whether the statements were improper.

To warrant the reversal of the conviction, the improper statements must also be flagrant, which requires considerations of the following factors: (1) whether the statements tended to mislead the jury or prejudice the defendant; (2) whether the statements were isolated or among a series of improper statements; (3) whether the statements were deliberately or accidentally before the jury; and (4) the total strength of the evidence against the accused.

The 6<sup>th</sup> Circuit concluded that Green had properly preserved his objection by objecting to the closing argument at its conclusion and moving for a mistrial. The fact that Green's counsel did not object continuously throughout the closing argument after the alleged improper remarks were made did not mean that the issue was not properly preserved for review.

However, after reviewing the challenged comments together with the entire closing argument, the court concluded that the statements did not constitute prosecutorial misconduct or an attempt to shift the burden

of proof. The questions posed by the government were presented in such a way as to indicate that they were for the jury to decide during its deliberations. There was nothing improper about posing rhetorical questions within the broad scope of closing.

The next issue raised by Green was that the district court erred by grouping the conspiracy convictions with the failure to appear conviction. In the process of grouping the two sets of convictions, the district court enhanced Green's offense level for the conspiracy convictions two levels for obstruction of justice under § 3C1.1.

Green maintained that the failure to appear calculation should be made separately rather than as an upward adjustment to his conspiracy convictions. However, the district court rejected Green's argument and he appealed this determination to the 6<sup>th</sup> Circuit.

For the first time, Green argued on appeal that the district court erred by using the 1998 edition of the Sentencing Guidelines Manual. Instead, Green maintained that the 1990 edition of the Guidelines Manual should have been used. This point was significant because the application of the 1990 edition of the Manual would have yielded a lower sentencing range than the 1998 edition because the grouping technique used in this case was not authorized in 1990.

Because this issue was not raised in the district court, the 6<sup>th</sup> Circuit used the plain error standard of review. An *ex post facto* problem exists when the guidelines in effect at the time of sentencing provide for a higher range than those in effect at the time that the crime was committed. Thus, the relevant language for this analysis is "in effect at the time the crime was committed."

Green argued that the failure to appear offense was committed on August 24, 1990 when he failed to appear for sentencing. Consequently, under this theory, the 1990 edition of the Guidelines Manual should apply. In contrast, the government maintained that the failure to appear offense was a "continuing offense" and therefore was not "committed" for purposes of the guidelines until he was apprehended.

After considering the nature of the crime of failing to appear, the 6<sup>th</sup> Circuit ruled

that the crime was a “continuing offense.” Like the crime of escape, failing to appear is not complete on the day the defendant fails to appear for court; instead, the crime continues until the defendant is apprehended and appears for sentencing. Each day the defendant fails to appear enhances the threat and the danger posed by the delay, demonstrating the continuing nature of the offense. Consequently, the application of the 1998 Guidelines Manual did not present an *ex post facto* problem.

Green next argued that the district court was obligated to group the conspiracy convictions with the failure to appear conviction. The failure to appear statute, 18 U.S.C. § 3146(b), does not specify a set term of imprisonment to be imposed. Instead, the statute states that a violation may be punished by a fine, imprisonment, or both. The statute’s only requirement is that if a sentence of imprisonment is imposed, that sentence must run consecutively to any sentence imposed for the underlying offense.

The 6<sup>th</sup> Circuit reviewed USSG §§ 3D1.1, 3D1.2, and 2J1.6, and concluded that they clearly call for grouping the failure to appear with the underlying offense. Although in calculating the base offense level for the conspiracy offense, two levels were added for obstruction of justice based on Green’s failure to appear, the failure to appear base offense level was separately calculated. Based upon the grouping rules, the highest offense level is used to impose sentence.

Because of the disparity between the offense level for the conspiracy convictions and the offense level for the failure to appear conviction, the conspiracy convictions were used to determine Green’s sentence. Consequently, the 6<sup>th</sup> Circuit concluded that the district court properly applied the grouping rules and the two level increase to Green’s offense level for his obstruction of justice, based on his failure to appear, did not violate the rule against double counting.

At sentencing, the district court indicated that it was going to sentence Green at the bottom end of the guideline range which was 151 months. As a result, Green’s counsel stated that his allocution “would be short.” However, after the abbreviated allocution, the

district court imposed a 151 month sentence for the conspiracy convictions and a 14 month consecutive sentence for the failure to appear conviction. When Green’s counsel attempted to object to the 165 month sentence, the district court judge rebuffed any attempts to discuss his change of heart.

On appeal, Green maintained that the district court mislead his counsel into shortening his sentencing arguments and denied his counsel the right of allocution which is clearly codified in Fed. R. Crim. P. 32(c)(3).

The 6<sup>th</sup> Circuit reviewed the vitriolic exchange between Green’s attorney and the district court and concluded that the court did not afford Green’s counsel the right of allocution. After informing Green’s counsel that he was going to impose a sentence at the low end of the guidelines, Green’s counsel understandably shortened his presentation. After a higher sentence was imposed, Green’s counsel attempted to raise an objection to the sentence. However, the district court stopped Green’s counsel from saying anything more and denied him the opportunity to allocute on behalf of his client. Accordingly, the case was remanded for resentencing to afford Green’s counsel the right to allocute.

***United States v. Elmore***, —F.3d—, 2002 WL 31055399 (6<sup>th</sup> Cir. 2002).

Detective Robinson was patrolling Rt. 33 when he stopped a 1991 Cadillac because it did not have a visible rear license plate. Upon very close inspection, Detective Robinson was able to discern and read, through the car’s heavily tinted rear window, the temporary license tag.

Ohio law requires that every automobile display valid license plates on the front and rear of the vehicle. Furthermore, Ohio law also requires that if a license tag is displayed in the rear window of a car, it must be clearly visible and not obstructed by the window’s tint.

The 1991 Cadillac was being driven by Orlando Elmore and Robinson obtained Orlando’s driver’s license and the vehicle’s registration. Although Orlando’s driver’s license reflected that he was a resident of Columbus, the vehicle registration indicated that the car was registered to Orlando at a

Chicago residence.

Robinson questioned Orlando about his trip and the identity of his passenger. Orlando explained that he: no longer lived in Ohio, now lived in Chicago, and traveled to Chicago by bus a few days earlier to purchase the car.

Detective Robinson then made a similar inquiry of the passenger, Tyron Maynus. Maynus' responses were not consistent with Orlando's. Moreover, Robinson smelled the odor of burnt marijuana emanating from the vehicle.

Robinson's suspicions were aroused about both the car and its occupants and he then consulted with another officer who had arrived on the scene. Orlando consented to the search of the vehicle which yielded \$10,000 in cash and six kilograms of cocaine.

N'Kenley Elmore, the appellant in this case, was implicated by Orlando and Maynus. N'Kenley was not in the vehicle with either Maynus or Orlando. However, after the three men were indicted for possession with intent to distribute more than five kilograms of cocaine, N'Kenley moved to suppress all of the evidence as a result of the stop and search of the vehicle that was driven by Orlando.

N'Kenley claimed that the stop of the vehicle was unreasonable and that the search was illegal because it was neither consensual nor supported by reasonable suspicion. The government challenged N'Kenley's ability to contest the reasonableness of the stop because he was neither the owner of the vehicle nor in the vehicle at the time that it was stopped.

The district court conducted an evidentiary hearing at which Orlando testified that: N'Kenley had given him money to purchase the car; Orlando was to transfer the title of the car to N'Kenley once the car arrived in Columbus; and the cocaine in the car was not Orlando's.

The district court granted N'Kenley's motion to suppress after finding that N'Kenley was the "putative owner" of the car and that he had a subjective expectation of privacy in its contents that society would recognize as reasonable. The government appealed the district court's suppression order.

In *Katz v. United States*, 389 U.S. 347 (1967), the Court ruled that "the 4<sup>th</sup>

Amendment protects people, not places." As a result, the question becomes "whether the challenged search and seizure violated the 4<sup>th</sup> Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the 4<sup>th</sup> Amendment was designed to protect."

The court first analyzed the traffic stop. N'Kenley had no possessory interest in the vehicle being driven. Even if N'Kenley supplied the money for the purchase of the car, it was undisputed that he was neither in the car when it was stopped nor was he anywhere in the vicinity of the car. Consequently, the stop of the car did not entail any interference with N'Kenley's possessory interest in the vehicle. Because N'Kenley failed to show an interference with his possessory interest in the car, he could not demonstrate that the officers' stop of the vehicle infringed any right personal to him that the 4<sup>th</sup> Amendment was designed to protect.

The court next turned to whether N'Kenley could complain of the search of the car even though he could not raise an issue about the stop. To challenge the search, N'Kenley must demonstrate that he personally had an expectation of privacy in the car that society was prepared to consider reasonable.

The 6<sup>th</sup> Circuit held that N'Kenley failed to show an expectation of privacy that society was prepared to recognize as reasonable. To support this conclusion, the court ruled that there was no evidence that N'Kenley had either the right or the ability to exclude others from the car or that he had taken any precautions to maintain his privacy in the car.

Moreover, it was undisputed that N'Kenley was not in the vicinity when the search occurred and there was no evidence that he was the intended recipient of the cocaine. Accordingly, the 6<sup>th</sup> Circuit ruled that N'Kenley had no legitimate expectation of privacy in the vehicle and could not challenge the constitutionality of the search.

*United States v. Chance*, —F.3d—, 2002 WL 31098347 (6<sup>th</sup> Cir. 2002).

In 1992, Chance ran for the office of Mahoning County Sheriff but lost the primary to the incumbent, Ed Nemeth. In 1996, Chance ran for sheriff again. However, missing from his 1996 campaign was a key ingredient in his 1992 campaign - the financial support of Youngstown mall developer Tony Cafaro. Because of the lack of financial enthusiasm in his campaign, Chance turned to Youngstown Mafia boss Lenny Strollo for financial assistance.

Strollo was having problems of his own in 1996. Strollo was a member of the Pittsburgh branch of *La Cosa Nostra*. Thanks to extensive payoffs to politicians and high ranking police officials, Strollo controlled all of the illegal gambling operations in the area surrounding Youngstown.

However, control of the gambling operations within Youngstown were a different matter. Strollo had two interrelated problems. One was that Strollo had competition from independent gambling operations. The second problem was that the police chief in Youngstown was someone who could not be bribed (a rarity in Mahoning County) and Strollo's agreement with Nemeth had run its course.

Consequently, Strollo had no influence within Youngstown. As a result, Strollo backed Chance in the election for county sheriff and then used Chance's department to close down those gambling operations that would not cooperate with Strollo's attempt to control gambling within Youngstown.

Chance asked John Chicase to approach "Jeep" Garono to solicit money from Strollo on Chance's behalf. Chicase warned Chance that if he took money from Strollo that "he would be selling his soul to the Devil." Nonetheless, Strollo met with Chance several times and Strollo testified that Chance understood what would be required when he took office.

After the meetings, Chance and Strollo used Chicase, Garono, and O'Nesti as intermediaries so that the two would not be connected and ruin Chance's bid to become sheriff. Strollo funneled more than \$30,000 to Chance's campaign and he also paid the cost

of catering one of Chance's fund raisers by forgiving a \$12,000 gambling debt owed to him by the cater's nephew.

Chance won the election and installed Chicase as the head of the vice department. According to Chicase's testimony, Garono identified two gambling operations that Strollo wanted raided. Chicase testified that Chance gave him permission to conduct the raids with the full knowledge that the requests for the raids came from Strollo.

In addition to his agreement with Strollo, Chance had his own plan to extort campaign contributions from Youngstown fireworks millionaire Bruce Zoldan. Zoldan supported Chance's opponent and thus did not contribute to Chance's campaign. Chicase testified that during the election, he and Chance discussed shutting down Zoldan's business after taking office in response to his lack of support.

After Chance took office, Chicase was involved in a meeting with Zoldan's chief of security, Robert Martino. Martino testified that when that meeting concluded, Chicase pulled him aside to tell him to tell Zoldan that if Zoldan did not "come across," he was going to shut his operation down. Martino relayed the message to Zoldan and as a result, Zoldan purchased \$2,000 in tickets to a golf outing being held to reduce Chance's campaign debt.

In 1999, Chance and Chicase were indicted by a federal grand jury. Chicase entered into a plea agreement with the government and testified against Chance. Chance was charged in count one of the indictment with conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c) (RICO). As predicate acts of the RICO charge, the indictment alleged three separate acts of bribery, two separate acts of extortion, and one act of obstruction of local law enforcement.

Count two charged Chance with conspiracy to commit a RICO violation in violation of § 1962(d). Counts three and four were substantive Hobbs Act charges for conspiring to extort campaign contributions from Zoldan and conspiring to extort a street tax from the independent local gambling operations that were operating in

Youngstown. Count five was the substantive charge of obstruction of local law enforcement in violation of 18 U.S.C. § 1511.

During the trial, and over Chance's objection, the district court permitted the prosecution to cross-examine Chance concerning the criminal indictments of other deputies working under him while he ran the sheriff's department. Moreover, the trial court denied Chance's Rule 29 motions for judgment of acquittal at the close of the government's case-in-chief and at the close of all of the evidence.

The jury convicted Chance of all counts. At sentencing, Chance's convictions were grouped pursuant to USSG § 3D1.2. The district court then used the bribery guideline, USSG § 2C1.1, to establish Chance's base offense level because it yielded the highest offense level.

The bribery guideline established a base offense level of ten. The district court then added two levels because the offense involved more than one bribe and eight additional levels because the offense involved payments for the purpose of influencing an elected official or an official holding a high level, decision-making position. Chance's offense level was enhanced two more levels for obstruction of justice because he committed perjury during his trial.

These determinations led to a base offense level of 22 and a criminal history category I. The district court then found that Chance's case was "outside the heartland of bribery cases" and departed upward three levels to a final offense level of 25. This determination yielded a sentencing range of 57 to 71 months. Chance was sentenced to serve 71 months imprisonment and he filed a timely notice of appeal.

The first issue considered by the 6<sup>th</sup> Circuit was Chance's argument that there was insufficient evidence to support his convictions. Count one of the indictment charged Chance with violating the RICO statute. The RICO statute defines an enterprise as "any individual, corporation, association, or other legal entity and any union or group of individuals associated in fact although not a legal entity."

Thus, under RICO, an enterprise may

play a different role depending on the subsection implicated. Under § 1962 (a) and (b), the enterprise is something acquired through illegal activities or by money obtained through illegal activities. For purposes of subsection (c), the enterprise is the instrument through which illegal activity is conducted.

In order to establish the existence of an enterprise under subsection (c), the government is required to prove: (1) an ongoing organization with some sort of framework or superstructure for making and carrying out decisions; (2) that the members of the enterprise functioned as a continuing unit with established duties; and (3) that the enterprise was separate and distinct from the pattern of racketeering activity in which it engaged.

Chance maintained that the government failed to prove that the alleged enterprise was separate and distinct from the pattern of racketeering activity. The 6<sup>th</sup> Circuit concluded that the evidence showed that the enterprise involved had a very clearly defined structure which was separate from the pattern of racketeering activity. The enterprise was structured to minimize the likelihood that anyone would discover that Chance was connected to Strollo.

Strollo identified the gambling operations that he wanted to shut down and he would pass those instructions to Garono. Garono then identified the operations for Chicase. Chicase then received approval from Chance to conduct raids on the operations. Chance also took orders from Strollo on accepting campaign contributions. Accordingly, the court concluded that Chance's challenge to the sufficiency of the evidence regarding the RICO enterprise alleged to the indictment was not meritorious.

Chance next maintained that the evidence was insufficient to support the jury's finding that the RICO enterprise in the alleged Hobbs Act extortions had an effect on interstate commerce. For purposes of a conviction under § 1962 (c) and (d), the government is only obligated to prove that the enterprise's racketeering activities had a *de minimis* connection with interstate commerce.

The 6<sup>th</sup> Circuit parsed the record and concluded that the government established the



requisite *de minimis* connection in this case. Chance extorted campaign contributions from Zoldan, whose company sold fireworks in interstate commerce. Moreover, the enterprise involved members of the Pittsburgh *La Cosa Nostra*. Strollo testified that he was a member of the Pittsburgh family and that proceeds from the illegal gambling operations were transferred across state lines.

Furthermore, the 6<sup>th</sup> Circuit concluded that the government also met its burden of establishing the required connection with interstate commerce with respect to the extortion of Zoldan that was alleged in count three of the indictment. Like RICO, the Hobbs Act only requires a showing of a *de minimis* connection with interstate commerce. In this case, Chance threatened to close down Zoldan's fireworks business if he did not make a campaign contribution. The fact that this threat was directed at Zoldan's business, and not Zoldan personally, illustrated that Chance knew of, and was paid by Zoldan's connection to interstate commerce.

However, the 6<sup>th</sup> Circuit did conclude that the evidence was insufficient to establish a *de minimis* connection with respect to the Hobbs Act extortion of the local book makers. The court found no evidence that the local gambling operations affected interstate commerce. Instead, the court ruled that there was insufficient evidence to establish a realistic probability that the operations had any effect on interstate commerce. Consequently, the court found that there were sufficient connections to interstate commerce to affirm the convictions on counts one, two, and three of the indictment. However, with respect to count four of the indictment, the court ruled that the evidence was insufficient to support a connection with interstate commerce and Chance's conviction on count four was reversed.

The next sufficiency of the evidence argument raised by Chance pertained to his allegation that the evidence was insufficient to establish that he was responsible for extorting campaign contributions from Zoldan. Zoldan testified that Martino told him that Chicase told Martino to tell Zoldan that he "did not treat the Chance campaign fairly and did not give him what he was able to afford to give

and that it wouldn't be forgotten about, and he would pay the price."

Martino testified that Chicase told him to relay a message to Zoldan: "If Bruce didn't come across, Chicase was going to shut his operation down." The court found that there were some gaps in the evidence but there were enough details to support an inference that Chance and Chicase conspired to extort campaign contributions from Zoldan. The fact that the threats that Chance made to Chicase, about Zoldan, mirrored their initial conversation on the subject indicates that at some point during the conversation, Chance and Chicase reached an agreement to extort money from Zoldan. Consequently, the court found sufficient evidence to support the jury's verdict on count three of the indictment.

Next, Chance argued that the evidence was insufficient to support a conclusion that one of the local gambling establishments, the Greek Coffee House, was an "illegal gambling business" within the meaning of 18 U.S.C. § 1511. In this regard, Chance maintained that the evidence was insufficient to support a conclusion that five or more persons conducted or managed the alleged illegal gambling business for a 30 day period.

The five person requirement can be satisfied at any point during the 30 days, regarding of the duration of the person's involvement in the business, so long as his participation is either regularly helpful or necessary to the operation of the gambling enterprise.

The only evidence submitted in support of count five was the testimony of Garono and Strollo. The court reviewed this testimony and concluded that Strollo's testimony established that only four persons participated in operating the gambling business during the time that he participated in the operation. Moreover, the court concluded that the five person requirement was not satisfied by evidence that the cumulative number of the participants in the illegal gambling business was five or more. Consequently, the 6<sup>th</sup> Circuit reversed Chance's conviction on count five.

Chance next contended that he was denied a fair trial when the district court permitted the AUSA to cross-examine him in

a manner that suggested guilt by association. On redirect examination, Chance attempted to impress the jury with his resounding endorsement of the personnel that he employed at the Mahoning County Sheriff's Department. Chance characterized all of the members of his department, except Chicase, as "competent and hard-working people."

When the AUSA claimed that Chance "opened the door" and he sought permission to probe this sensitive area, Chance's attorneys objected and argued that the door was not opened. However, the district court responded "Competent hard-working people. Are you crazy? You just opened the biggest door to bring a truck through."

Consequently, the government was permitted to ask Chance about two specific instances of misconduct involving members of his department. The first involved a drug raid led by Jeff Chance, Appellant's brother, in which a bag of powder was seized. Chance represented to the media that the bag contained cocaine when he knew that it contained only powder. Mysteriously, the bag was never booked into evidence. The district court permitted the government to elicit testimony from Chance that his brother, Jeff Chance, was under indictment for this incident. The government also adduced testimony from Chance that one of his deputies, Antonio Owens, had pled guilty to obstructing justice for falsely swearing out an affidavit in support of a search warrant.

After this testimony was elicited, Chance moved for a mistrial on the grounds that the AUSA's questions exceeded the permissible scope of cross-examination and that the district court permitted evidence of an indictment to be used as proof of guilt. Counsel also asked the district court to issue a contemporaneous cautionary instruction to the jury stating that the fact of an indictment is not proof of guilt. The district court denied Chance's motion for a mistrial as well as his requested contemporaneous cautionary instruction. Instead, the issue was addressed in the court's general charge after closing arguments.

On appeal, Chance maintained that the district court erred by allowing the prosecution to suggest that he was guilty of

the crimes charged by his association with family members and employees of the Mahoning County Sheriff's Department. Furthermore, Chance argued that the district court erred by failing to give the jury a contemporaneous limiting instruction.

When one party has "opened the door" on an issue, the opponent, in the trial court's discretion, may introduce evidence of the same issue to rebut any false impression that may have been created by the earlier admission of evidence. With that said, the 6<sup>th</sup> Circuit observed that a witness may not be impeached by evidence that he was indicted for a crime since an indictment is not evidence of guilt. Moreover, the prosecutor should not comment on the fact that a defendant has been indicted on the crimes being tried as proof of guilt. Furthermore, establishing guilt by association is an improper manner in which to obtain a conviction. Finally, a prosecutor may not use proof of another conviction as evidence against the accused.

When Chance portrayed his fellow deputies as "competent and hard-working people," the jury was left with the impression that the persons identified were "wholesome industrious citizens." However, the 6<sup>th</sup> Circuit observed that wholesomely industrious law enforcement officers do not plant evidence, mistake flour for cocaine, or swear out false affidavits in support of a search warrant. Consequently, the district court did not err by permitting the government to cross-examine Chance about these indiscretions.

The next issue addressed by the 6<sup>th</sup> Circuit was the refusal of the district court to give a contemporaneous limiting instruction under Fed. R. Evid. 105 on the proper use of the challenged testimony. Even though the district court refused to give a contemporaneous limiting instruction; during final instructions, the court reminded the jury that it heard evidence that other persons may have committed illegal acts and that such evidence could not be considered as evidence that Chance committed the crimes charged in the indictment.

The district court further gave an instruction to the jury on the proper purpose for which such evidence could be considered. Although the instruction was not tailored to

the testimony that the government enlisted from Chance, he did not request the trial court to give a more specific instruction. Finally, the court held that even if error was committed by not giving a contemporaneous instruction, any error was harmless.

The final issues addressed by the 6<sup>th</sup> Circuit pertained to the application of the sentencing guidelines. The first issue considered the appropriateness of a two level enhancement for obstruction of justice pursuant to USSG § 3C1.1. Chance maintained that the trial judge erred in applying the sentencing enhancement for obstruction of justice based on his perjury because the trial court did not identify any particular answers that were materially false.

The district court's decision to impose an obstruction of justice enhancement is subjected to a three step process of review by the 6<sup>th</sup> Circuit. First, the court must review the district court's finding of facts underlying the enhancement for clear error. Second, the district court's conclusion that a given set of facts constitutes obstruction of justice is a mixed question of law and fact which must be reviewed *de novo*. Third, once the district court has determined that the defendant has obstructed justice, the application of the two level enhancement is mandatory and the enhancement is reviewed *de novo*.

The district court cannot rely on the jury's verdict in applying an obstruction of justice enhancement for perjury. Instead, in order to impose an obstruction of justice enhancement for perjury, the district court must find that the defendant committed perjury, *i.e.*, that the defendant testified falsely concerning a material matter with the full intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.

Thus, the district court must identify the particular portions of the defendant's testimony it considers to be perjurious. Then the court must make specific findings as to each element of perjury or make a finding that encompasses all of the factual predicates for the finding of perjury.

In this case, the district court concluded that Chance perjured himself by denying: (1) having any relationship with

Strollo; (2) taking money from Strollo and Garono; and (3) selectively enforcing the gambling laws in favor of Strollo. Moreover, the district court made a finding that Chance's testimony was "pervasively perjurious," stating that Chance "denied virtually every single fact that other witnesses testified to despite substantial evidence to the contrary."

The 6<sup>th</sup> Circuit reviewed the testimony adduced at trial and concluded that the district court properly identified the subject matter about which Chance was untruthful and carried out its burden of identifying the portions of Chance's testimony that were perjurious. Consequently, a § 3C1.1 enhancement was appropriate.

The final question was whether the district court erred by upwardly departing from the guideline range. The district court found that a three level upward departure was appropriate because the guidelines did not take into consideration the fact that Chance was chief law enforcement officer for the county, the bribery offenses involved members of organized crime, and Chance violated the state election laws in running for office.

According to the framework elucidated in *Koon v. United States*, 518 U.S. 81 (1996), a four step process must be used by the district court to determine whether a departure from the guidelines is appropriate: (1) what features of the case, potentially, take it outside the Guidelines' "heartland" and make it a special or unusual case? (2) has the Commission forbidden departures based on those features? (3) if not, has the Commission encouraged departures based on those features? (4) if not, has the Commission discouraged departures based on those features?

If the special factor of the case is a forbidden factor, the sentencing court cannot use it as grounds for departure. If this special factor is an encouraged factor, the sentencing court may depart if the guideline does not already take the factor into consideration. If the factor is a discouraged factor, or an encouraged factor already taken into account by the guidelines, the court should depart only if the factor is present to a degree that makes the case different from the ordinary case

where the factor is present. Finally, if the factor is not mentioned by the guidelines, the court must, “after considering the structure and theory of both relevant individual guidelines and the guidelines as a whole, decide whether it is sufficient to take the case out of the guidelines heartland.”

The 6<sup>th</sup> Circuit concluded that the eight level enhancement under 2C1.1(b)(2)(B) took into consideration the fact that Chance was the highest law enforcement official in Mahoning County. As a result, the district court could not rely on this fact to justify an upward departure. However, the district court was authorized to justify an upward departure on the fact that Chance took bribes from organized crime figures.

The court also found that under USSG § 1B1.4 as well as *United States v. Watts*, 519 U.S. 148 (1997), the fact that Chance violated state campaign laws, even though he was neither charged nor convicted for that conduct, could justify an upward departure from the guidelines.

Therefore, even though the district court improperly relied on one factor, the 6<sup>th</sup> Circuit could still affirm the decision to depart from the guidelines as long as the remaining reason or reasons were sufficient to justify the departure. The 6<sup>th</sup> Circuit concluded that the two valid bases for an upward departure were sufficient to justify the district court’s upward departure. In short, “this was not a garden variety bribery case.”

The final question to be determined was whether the amount of the upward departure was reasonable. Chance contended that the district court did not explain why the three level departure was appropriate. The 6<sup>th</sup> Circuit agreed and found that the district court’s statements in support of the three level departure appeared more like reasons which mitigate a five level departure rather than explain the appropriateness of a three-level departure. Consequently, the case was remanded to the district court to justify the extent of this departure.

***United States v. Davis***, —F.3d—, 2002 WL 31114137 (6<sup>th</sup> Cir. 2002).

Davis was charged with aiding and abetting two armed bank robberies and two counts of aiding and abetting the use and

brandishing of a firearm during those robberies. Davis was arraigned on the original indictment, at which time, he was informed that the penalty for the second firearm violation was 25 years imprisonment.

A superseding indictment was filed subsequent to the arraignment with only minor modifications being made to the charges. At Davis’ second arraignment on the superseding indictment, the magistrate informed Davis that he faced a possible sentence of only seven years for each firearm offense. Davis represented that he understood the charges and the possible sentences that he faced.

Consequently, Davis pled not guilty and his counsel failed to inform him that he faced a 25 year sentence if convicted of the second firearms offense. At Davis’ trial, his 14 year old accomplice testified that he robbed the two banks and that he was aided by Davis during each robbery. During each of the robberies, the juvenile indicated that Davis meticulously planned the events. Moreover, Davis provided the juvenile with the firearm to use during the commission of the robberies.

At the end of the second day of trial, Juror Stephens notified the court that she worked with the mother of one of the government witnesses who had just testified. The district court advised the parties of this development and defense counsel suggested making Juror Stephen an alternate.

The following day, the district court again addressed this issue and the prosecutor adopted defense counsel’s earlier solution. Because both parties agreed to allow Juror Stephens to remain on the jury as an alternate, she served in this capacity until she was dismissed.

On the third day of trial, the prosecutor informed the district court that he had forgotten to turn over to defense counsel audiotapes of phone calls that one of Davis’ accomplices’ made while he was in jail. Defense counsel told the district court that he had not had an opportunity to review the tapes and did not know whether they contained exculpatory or inculpatory information.

The prosecutor proposed that at the end of the day, he would give defense counsel the tapes to review and that defense counsel should be allowed to recall any witness who

was on the tape, if he deemed it necessary. Defense counsel stated that he believed that this was a satisfactory solution provided that he was given enough time to listen to the tapes.

Davis informed his attorney that he did not want his trial to be postponed; instead, he wanted the trial resolved that day. The district court conducted a colloquy with Davis in which it informed Davis of the need for his counsel to listen to the tapes before the trial concluded. However, Davis was adamant that his trial should conclude that day.

Davis got his wish as his trial concluded that day with the jury convicting him of all counts. Davis was ordered to: serve 481 months imprisonment, pay restitution, and complete a term of supervised release. Davis then filed a timely notice of appeal.

The first issue raised on appeal was whether there was sufficient evidence to sustain Davis' convictions for aiding and abetting the bank robberies and aiding and abetting the use and brandishing of the firearms during those crimes.

In order to prove armed bank robbery, the government must show: (1) that by force or threat of force; (2) the defendant attempted to take from a person, in another's presence, an item of value; (3) that was in the custody or control of a bank; and (4) in doing so, placed in jeopardy the life of any person by use of a dangerous weapon or device.

In order to prove the alleged firearms violation, the government had to establish that during, and in relation to a crime of violence, the principal used, carried, and/or brandished a firearm.

Davis was charged with aiding and abetting the commission of these crimes. To be convicted as an aider and abettor, the government had to prove that Davis "offered assistance or encouragement to his principal in the commission of a substantive offense." "Aiding and abetting requires that a defendant in some sort associate himself with the venture, that he participates in it as something he wishes to bring about, and that he seek by his action to make it succeed. Thus, it has been said that aiding and abetting involves an act by a defendant which contributes to the execution of a crime; and the intent to aid in

its commission." The court reviewed the record and concluded that there was ample evidence to support all four of Davis' convictions.

Davis next argued that the indictment was defective for failing to include all of the essential elements of the crimes charged. Davis contended that his sentence of 25 years on the second firearms violation must be vacated because he was indicted by the grand jury only for violating 18 U.S.C. § 924(c)(1)(A)(ii) which carries a seven year term of imprisonment. The indictment did not allege a violation of 18 U.S.C. § 924(c)(1)(C)(1)(i) which states that for a second or subsequent firearms conviction, the defendant shall be sentenced to a 25 year term of imprisonment.

Additionally, Davis also claimed that the indictment was defective because it failed to allege the type of firearm that he brandished. According to Davis, the type of firearm was an essential element that must be alleged in the indictment.

In *Castillo v. United States*, 530 U.S. 120 (2000), the Supreme Court dealt with the issue of whether, under the firearm statute, the type of weapon involved was a sentencing factor or an element of the crime to be determined by a jury. In *Castillo*, Castillo's sentence was increased when the district court made a factual determination that the type of gun that he possessed was a machine gun. The district court then imposed a higher sentence as prescribed by statute.

The Court held that Congress intended the firearm type to be considered as an element of a separate aggravated crime and not merely to serve as a sentencing factor. However, in this case, Davis was charged and convicted under the general § 924(c)(1)(A) provision and his sentence was not enhanced because of the type of firearm used in the crime. Consequently, the 6<sup>th</sup> Circuit rejected Davis' argument and found *Castillo* inapplicable.

The 6<sup>th</sup> Circuit also found that the indictment was not defective because it failed to charge him with a violation of § 924(c)(1)(C)(i). This provision provides that for a second or subsequent conviction under the firearms statute, a defendant must be

sentenced to a term of 25 years imprisonment. The 6<sup>th</sup> Circuit found that according *Deal v. United States*, 508 U.S. 129 (1993), where a defendant is convicted of multiple § 924 violations, the second or subsequent convictions are subject to an enhanced penalty even though the notice of the enhancement is not contained within the body of the indictment.

Davis next maintained that the firearms counts were duplicitous and must be dismissed because they charged two distinct offenses within each count. An indictment is duplicitous if it sets forth separate and distinct crimes in one count. The overall vice of duplicity is that the jury cannot, in a general verdict, render its finding on each offense, making it difficult to determine whether a conviction rests on only one of the offenses or on both. A general guilty verdict will not reveal whether the jury found the defendant guilty of one crime and not guilty of others, or guilty of all.

The 6<sup>th</sup> Circuit reviewed the jury instructions provided by the district court and concluded that even if the firearms counts were duplicitous, Davis was unable to demonstrate that his substantive rights were affected by any alleged duplicity. Consequently, this argument was rejected.

The 6<sup>th</sup> Circuit next considered whether the district court erred by not declaring a mistrial when it was discovered that Juror Stephens informed the court that she worked with the mother of a government witness. Davis contended that instead of removing the juror immediately and determining whether there was any residual taint, the district court improperly allowed the juror to remain and only removed her at the end of the proceedings.

The 6<sup>th</sup> Circuit ruled that there was no constitutional prohibition in jurors knowing the parties involved or having knowledge of the case. In this case, the jurors all indicated that they were able to render a fair and impartial verdict. Consequently, the simple fact that Juror Stephen knew the mother of a government witness, without more, did not rise to the level of prejudice.

Davis next argued that he was entitled to reversal of his conviction because the

prosecutor delayed the disclosure of the existence of the tape-recordings of the phone conversations between one of Davis' accomplices until the trial was under way.

There is no question that the prosecution is required to disclose material exculpatory evidence to a criminal defendant. However, reversal for a *Brady* violation is required only where there is a reasonable probability that, had the evidence been disclosed, the result of the trial would have been different. Thus, *Brady*, generally does not apply to delayed disclosure of exculpatory information, but only to a complete failure to disclose. A delay in disclosure violates *Brady* only when the delay causes prejudice.

The Jencks Act requires the prosecution to supply the defense with any material statement made by a witness to the government that was signed or otherwise verified by the declarant. When *Brady* material sought by a defendant is also covered by the Jencks Act, the terms of that statute govern the timing of the government's disclosure obligation.

The 6<sup>th</sup> Circuit found that Davis failed to show that the delay in disclosing the tapes violated *Brady* inasmuch as he failed to proffer any information on the tapes that would have undermined the witnesses' testimony or even arguably changed the outcome of the trial. Moreover, the district court offered defense counsel every opportunity to review the tapes prior to proceeding with the trial. However, against the advice of the district court and his own counsel, Davis refused to postpone his trial to allow his counsel to review the tapes. Under these circumstances, the 6<sup>th</sup> Circuit concluded that Davis failed to show that he was prejudiced by any violation of *Brady* or the Jencks Act.

The final issue addressed by the 6<sup>th</sup> Circuit was whether the district court erred when it ordered restitution to be paid in full immediately, despite the presentence report's finding that Davis was indigent. Davis claimed that the court failed to consider his other financial obligations in imposing a restitution order. Moreover, the district court's restitution order also failed to set forth a schedule of payments; instead, the order

allowed the Bureau of Prisons to determine the schedule of payments.

Davis was sentenced under the Mandatory Victims Restitution Act of 1996 (MVRA), 18 U.S.C. §§ 3663A-3664. Under the MVRA, restitution is mandatory, regardless of a defendant's financial situation when a defendant is convicted of a crime of violence, an offense against property, or an offense relating to tampering with consumer products. Therefore, the district court was not obligated to consider Davis' indigence in determining whether restitution should be ordered.

A restitution order may provide that the defendant pay the amount owed in one lump sum, in periodic payments, or, if economic circumstances dictate, in nominal periodic payments until the restitution amount is paid in full. Davis contended that the district court erred by allowing the Bureau of Prisons to set a payment plan without considering his financial obligations to his dependents and the amount of money that he earned from his prison job.

The 6<sup>th</sup> Circuit found that the MVRA expressly states that the court shall specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid and in doing so shall consider the factors delineated in the statute. The court reviewed the record and concluded that the terms of Davis' payment schedule were unclear.

Davis contended that a payment schedule was set by the Bureau of Prisons. However, there was no indication that the factors outlined under 18 U.S.C. § 3664(f)(2)(A)-(C) were considered in setting the payment schedule. Consequently, the case was remanded for the district court to determine a payment schedule.

***United States v. Townsend***, —F.3d—, 2002 WL 31127199 (6<sup>th</sup> Cir. 2002).

On June 16, 1999, two highway patrol troopers stopped an automobile driven by Townsend because it was traveling 76 m.p.h. in a 65 m.p.h. zone. As the troopers approached the vehicle, Townsend put his hands in the air without any prompting. Even though the radar indicated that the vehicle was traveling 76 m.p.h., Townsend quickly

admitted that he was traveling 85 m.p.h. Townsend produced his license, registration, and proof of insurance when the troopers arrived at the window. The troopers thought that this "reflective behavior" demonstrated an "unusual eagerness to end the stop quickly."

Shortly after the stop, a third trooper came to the scene and all three troopers testified that Townsend and his co-defendant, David Green acted nervously. The troopers' based this conclusion on their observation of Townsend frequently looking back at the troopers while they were processing their paperwork.

Townsend's name matched the name listed on the proof of insurance form for the car but the registered owner of the vehicle was his mother. The troopers concluded that it was suspicious that the record owner of the vehicle was not present because drug couriers often do not own the cars that they are driving.

Townsend and Green were questioned about the purpose of their journey. Townsend claimed that they were traveling from Chicago to visit his sister in Columbus but he was unable to recall her address. Instead, Townsend claimed that he planned to call his sister once he reached the Columbus area. The troopers determined that this explanation was suspicious because Townsend would be calling his sister in the early morning hours when he arrived in Columbus. Moreover, the troopers considered Chicago to be a source city for narcotics and Columbus to be a destination city.

The troopers observed three cellular phones and a bible in the passenger compartment of the vehicle. The large number of cell phones were typical for drug traffickers and the troopers believed that drug couriers often prominently display religious symbols in their vehicles in order to deflect suspicion of drug smuggling.

Both Green and Townsend were asked to exit the vehicle and were frisked for weapons. No weapons were found on the defendants but a large roll of cash was detected. The presence of a large sum of cash also indicated to the troopers that Townsend and Green were involved in the transportation of narcotics.

The troopers also searched the

passenger compartment of the vehicle for weapons, but found none. After finding no contraband in the passenger compartment of the vehicle or on the defendants' persons, the troopers ordered the defendants to sit in the back of a patrol car while a canine unit was summoned to the scene.

Thirty minutes later, a canine appeared on the scene and alerted on the trunk of the car. Because of the dog's alert, the troopers opened the vehicle and searched the trunk. However, there was no contraband located in the trunk. The troopers dismantled a CD changer mechanism in the back of the vehicle and lodged inside the changer were ten counterfeit \$100 bills.

The troopers arrested both Green and Townsend for possession of counterfeit currency and they were subsequently indicted for violating 18 U.S.C. § 472. The defendants moved to suppress the counterfeit \$100 bills seized during the search of the trunk.

According to the district court, the troopers had probable cause to believe that the defendants were speeding and therefore validated the initial stop. However, the court ruled that the troopers lacked the reasonable suspicion required to detain the defendants and their car beyond the time reasonably necessary to issue a traffic citation.

According to the district court, this invalid detention provided the troopers with sufficient time for the canine unit to arrive. Without the dog alerting on the trunk, made possible by the invalid detention, the troopers would not have had probable cause to search the trunk. As a result, the district court ruled that the invalid detention tainted the search and the counterfeit currency was suppressed.

The government appealed the district court's suppression order. The 6<sup>th</sup> Circuit found that a police officer may effect a traffic stop of any motorist for any traffic infraction, even if the officer's true motive is to detect more extensive criminal conduct. However, to detain the motorist any longer than is reasonably necessary to issue a traffic citation, the officer must have reasonable suspicion that the individual has engaged in more extensive criminal conduct.

Because the troopers had probable cause to initiate the traffic stop, the sole

question presented in this case was "whether they also had the reasonable suspicion necessary for the continued investigatory detention of the defendants, a detention that permitted the canine unit to arrive and that created the probable cause that would otherwise justify the search."

The appropriate standard of review required the court to determine whether the combination of factors considered by the troopers was sufficient to support a reasonable suspicion finding. To do this, the 6<sup>th</sup> Circuit evaluated the totality of the circumstances upon which the officers relied to justify the continued stop of the vehicle.

The court concluded that the government pointed to several factors which had been previously recognized as valid considerations to support a reasonable suspicion finding. These factors included the defendants' nervous behavior, their point of origin and destination, their purpose for the trip, the presence of cellular phones, a bible and a substantial sum of cash, and the absence of the titled owner of the vehicle. However, those considerations were relatively minor and were subject to significant qualification. The 6<sup>th</sup> Circuit ruled that this case lacked "any of the strong indicators of criminal conduct that have accompanied these minor factors in other cases."

Consequently, the court held that the troopers lacked reasonable suspicion to detain Townsend and Green until the canine unit arrived. Accordingly, the district court's order suppressing the counterfeit bills seized during the search of the trunk was affirmed.

***United States v. Chapman***, —F.3d—, 2002 WL 31119040 (6<sup>th</sup> Cir. 2002).

In 1999, the Louisville Police Department intercepted a package in the mail filled with nearly one kilogram of cocaine. The officers traced the mailing address of the package to an abandoned home and discovered that Lonnell Shelmon, a convicted drug trafficker, used the home to occasionally receive packages.

The police followed Shelmon from a meeting with his parole officer to a motel where Shelmon briefly went inside. When Shelmon re-emerged, he was approached by the officers and he immediately fled.



Shelmon was apprehended and the officers found a bag of cocaine in his pocket. Moreover, Shelmon told the officers that he bought the cocaine from individuals who were occupying Room 219 of the motel.

After Shelmon was arrested, the officers observed two men, who fit the description of the men occupying Room 219, walking from the motel. When the men noticed the police interrogating Shelmon, they immediately walked in separate directions.

One of the men, later identified as Chapman, was approached by Detective Napier and was observed holding an opaque trash bag. As Napier approached, Chapman complained that “can’t a man just take out his garbage,” and he dropped the trash bag.

When the bag hit the ground, it opened and Napier observed a mixing bowl with cocaine residue, baking soda, several small plastic bags and a mixer. Chapman was immediately arrested.

Chapman was indicted for conspiracy to distribute crack and possession with the intent to distribute crack. Chapman moved to suppress the evidence found in the trash bag claiming that the officer lacked reasonable suspicion necessary for a *Terry* stop, which, he contended, provided the occasion for the officer to see the drug paraphernalia.

The district court denied Chapman’s motion to suppress and he entered a conditional guilty plea. A presentence report was prepared in which Chapman’s offense level was determined to be 33 and his criminal history category was III. These determinations yielded a sentencing range of 168 - 210 months. The district court sentenced Chapman to serve 168 months in prison and he then filed a timely appeal.

In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court held that a police officer may briefly detain an individual, question him, and perform a limited frisk for weapons if the officer reasonably suspected the individual of criminal activity. The 6<sup>th</sup> Circuit concluded that Napier’s actions in this case did not amount to a *Terry* stop.

Chapman was never frisked before he dropped the bag. Napier never identified himself as a police officer and requested to ask Chapman a few questions about a

narcotics investigation. Moreover, Napier never ordered Chapman not to move. In short, the 6<sup>th</sup> Circuit found that Napier’s actions fell well short of a seizure requiring any justification. As long as a reasonable person would have felt free to leave the situation, a seizure did not occur within the meaning of the 4<sup>th</sup> Amendment.

However, the court assumed, *arguendo*, that Napier’s actions constituted a *Terry* stop. After making this leap of faith, the 6<sup>th</sup> Circuit ruled that Napier’s questioning of Chapman was based on the reasonable suspicion standard and the circumstances surrounding the questioning more than met this standard. Napier had direct knowledge of drug activity that occurred in the hotel room from which Chapman exited. Consequently, the 6<sup>th</sup> Circuit rejected Chapman’s 4<sup>th</sup> Amendment argument.

On appeal, Chapman also argued that the district court erred in determining that he was responsible for 1,336 grams of crack, without requiring the government to prove the amount beyond a reasonable doubt. According to Chapman, the district court was required, after *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to apply a higher standard of proof to any facts that “enhance” a defendant’s sentence.

However, the 6<sup>th</sup> Circuit has never ruled that *Apprendi* applied to every fact that increases the defendant’s sentence within the rubric of the guidelines. The indictment in this case specifically charged Chapman with conspiracy to distribute and possession with intent to distribute “1,336 grams of cocaine base.” Chapman’s guilty plea to the charges contained in the indictment established “the facts alleged in those counts beyond a reasonable doubt.” Therefore, even if *Apprendi* applied to this case, it would have been satisfied by Chapman’s guilty plea.

However, even absent a guilty plea, because Chapman’s sentence of 168 months was less than the default penalty of 20 years imprisonment found in 21 U.S.C. § 841(b)(1)(C), there was no *Apprendi* problem presented by the sentence imposed. Consequently, the court affirmed the conviction and sentence imposed.

*Goode v. United States*, —F.3d—, 2002 WL 31114078 (6<sup>th</sup> Cir. 2002).

In 1997, Goode was charged in a superseding indictment with two drug distribution offenses as well as two firearms offenses. A jury convicted Goode of all offenses and because of his two prior felony drug convictions, his sentence was enhanced pursuant to 21 U.S.C. §§ 841 and 851.

Although the indictment was silent about the quantity of drugs for which Goode was responsible, the district court determined that Goode's relevant conduct was between 50 and 150 grams of crack. This determination yielded a statutory sentencing range of 10-life. As a result of the enhancement for the prior convictions, Goode was sentenced to serve life imprisonment on one of the drug offenses and the rest of his convictions were ordered to run concurrently to the life sentence.

Goode was unsuccessful on direct appeal and his petition for a *writ of certiorari* was denied in 1999. On June 26, 2000, the Supreme Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Consequently, Goode filed a § 2255 motion to vacate his sentence. The district court denied Goode relief and he appealed to the 6<sup>th</sup> Circuit.

The court found that the *Apprendi* decision stood for the proposition that “other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”

With respect to drug convictions under § 841, the 6<sup>th</sup> Circuit has held that quantity and type of drugs attributable to a defendant must be submitted to a jury for a determination beyond a reasonable doubt.

Because Goode's sentence was increased beyond the 30 year statutory maximum under § 841(b)(1)(C) (based upon the district court's finding, by a preponderance of the evidence, that he was responsible for 50 to 150 grams of crack), the 6<sup>th</sup> Circuit found that Goode's life sentence was erroneous under *Apprendi*. However, the issue presented for the court's decision was whether *Apprendi* should be retroactively applied to convictions that were final prior to the decision.

As a general rule, new constitutional

decisions are not applied retroactively to convictions that were final prior to the decision. The principle of finality within the criminal justice system weighs heavily against retroactive application of new constitutional law, especially in light of the significant percentage of drug trafficking convictions decided in federal court.

In *Teague v. Lane*, 489 U.S. 288 (1989), the Supreme Court articulated two exceptions to the general rule of non-retroactive application for new rules of criminal procedure. An exception that allows retroactive application of the new rule applies only if the new rule: (1) places certain kinds of private individual conduct beyond the power of the criminal law making authority to proscribe; or (2) requires the observance of those procedures that are “implicit in the concept of ordered liberty.”

The question in this case was whether *Apprendi* was a “watershed rule” that “implicates the fundamental fairness of a trial” under the second exception to the general non-retroactivity rule of *Teague*. The 6<sup>th</sup> Circuit ruled that *Apprendi* clearly established a “new rule” because the result of *Apprendi* was not controlled by any precedent existing at the time Goode's conviction became final.

Before the Supreme Court decided *Apprendi*, federal circuits that considered the question of the constitutionality of drug quantities being determined by the court rather than the jury had concluded that this was an acceptable procedure because drug quantity was a sentencing factor, and not an element of the offense.

Despite *Apprendi* being a new rule, it should not be retroactively applied unless it is also one of “watershed importance.” This classification is only reserved for “a small core of rules requiring observance of those procedures that are implicit in the concept of ordered liberty.”

To qualify as a “watershed rule,” the new rule must improve the bedrock procedural elements essential to the fairness of a proceeding. One example of a “watershed rule” would be the Supreme Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which provides counsel in all criminal trials for “serious offenses.”

The 6<sup>th</sup> Circuit ruled that *Apprendi* merely limits the potential penalty to be imposed on a defendant. Unlike *Gideon*, the *Apprendi* decision has no bearing on the basic determination of a defendant's guilt or innocence. Consequently, the 6<sup>th</sup> Circuit held that *Apprendi* did not create a "watershed rule" and is not to be retroactively applicable to convictions that were final before the decision was filed.

*United States v. Kimble*, —F.3d—, 2002 WL 31133379 (6<sup>th</sup> Cir. 2002).

While serving a state prison sentence, Kimble was called upon to testify before a federal grand jury investigating Winston and Clemmons for their involvement in a drug-related homicide. In exchange for his testimony before the grand jury, Kimble was offered immunity from prosecution for any evidence garnered against him in the proceeding. Kimble accepted the offer and testified before the grand jury resulting in the indictment of both Winston and Clemmons.

The government filed a motion to compel Kimble's testimony at the trial of Winston and Clemmons. The district court granted the motion. However, prior to the trial, Kimble informed the government that he was unwilling to testify because he feared for his safety.

Nonetheless, Kimble was called to testify at the trial of Winston and Clemmons. Kimble was placed under oath, reminded that he was immune from prosecution, and warned of the consequences for refusing to testify. In explaining his refusal to testify, Kimble said he refused to testify "because I don't want to." The district court appointed counsel for Kimble and adjourned. The next day, Kimble was again brought before the district court and ordered to testify.

After he continued to refuse to testify, the district court found Kimble in civil contempt and sentenced him to serve 30 days in jail. Despite Kimble's refusal to testify, Winston and Clemmons were convicted of the homicide offense.

Kimble was indicted for, and he pled guilty to criminal contempt for his refusal to testify at the trial. The guidelines make no recommendation for criminal contempt convictions; instead, they encourage the

sentencing judge to apply "the most analogous offense guideline." USSG § 2X5.1.

In his plea agreement, Kimble conceded that the most analogous guideline was the obstruction of justice guideline, § 2J1.2. However, § 2J1.2 also contains a cross-reference to § 2X3.1 which must be applied if the "offense involved obstructing the investigation or prosecution of a criminal offense." Because the underlying prosecution involved a homicide, USSG § 2X3.1 provided a base offense level six levels lower than the offense level for the homicide for which Winston and Clemmons were convicted.

When the dust settled, Kimble's decision not to testify resulted in a sentencing range of 780-87 months. At the sentencing hearing, Kimble objected to the application of § 2X3.1 by arguing that the plea agreement contemplated a base offense level of 12 as set forth in § 2J1.2. The district court disagreed noting that the § 2X3.1 cross-reference was mandatory and must be applied because Kimble's conduct obstructed the prosecution another criminal offense. Kimble was sentenced to serve 70 months in prison and he filed a timely notice of appeal.

The 6<sup>th</sup> Circuit considered the appropriateness of the district court's guideline application. On appeal, Kimble asserted that his sentence should have been calculated with reference to § 2J1.2 and not § 2X3.1.

However, in contempt of court convictions, the 6<sup>th</sup> Circuit interpreted the guidelines to require the district court to calculate the base offense level under both § 2J1.2 and § 2X3.1. The 6<sup>th</sup> Circuit held that the mandate of the guidelines was clear in that the district court was obligated to apply the guideline yielding the higher offense level.

Consequently, the court ruled that the application of the § 2X3.1 cross-reference was mandatory. Therefore, Kimble's claim that he was not actually an accessory after the fact to the homicide was irrelevant because it did not matter whether he was actually guilty of the crime referenced in § 2X3.1 in order for the higher sentence recommendation be imposed. Accordingly, the district court's application of the guidelines was affirmed.

*Hardaway v. Withrow*, —F.3d—, 2002 WL 31155055 (6<sup>th</sup> Cir. 2002).

Hardaway shot and killed a man during an aborted drug transaction and he was tried for first degree murder under Michigan law. Hardaway testified at his trial that he shot in self-defense. At most, Hardaway's attorney argued that he was guilty of voluntary manslaughter. The prosecution's theory was that Hardaway committed the killing by design and intended to kill two other drug buyers in order to facilitate a robbery.

In the charge conference, the prosecutor argued against giving a voluntary manslaughter instruction whereas Hardaway's attorney contended that the charge was essential. The trial court sided with Hardaway and stated that "I think we really need to give voluntary manslaughter based on that."

After both sides rested their cases, the trial judge instructed the jury on the offenses of first degree murder and the lesser included offenses of second degree murder and voluntary manslaughter.

The verdict form provided to the jury gave it four options for a verdict with respect to the homicide charge: (1) not guilty; (2) guilty of first degree murder; (3) guilty of second degree murder; and (4) guilty of voluntary manslaughter.

After the jury was instructed, the foreman sent the court a note that resulted in the jury being brought back into the courtroom. The jury asked for a definition of second degree murder. The trial court obliged and provided the jury with its requested instruction and the jury then retired and continued deliberating.

After the jury left the courtroom, Hardaway's attorney informed the trial court that one of the jurors had also asked to have the manslaughter instruction repeated. The prosecutor confirmed the accuracy of this report and both counsel agreed that the voluntary manslaughter charge should be repeated.

The court recessed for the afternoon and when it convened the next morning, the trial judge informed the parties that "I did get a note wherein the jury asked for a Xerox copy of second degree involuntary manslaughter and I sent those into them and we've just a

couple of minutes ago got a note from them indicating they have a verdict so let's bring the jurors in." The jury convicted Hardaway of second degree murder and he appealed claiming that the trial court erred by providing the jury with the involuntary manslaughter instruction.

The Michigan Court of Appeals rejected Hardaway's argument that the trial court erroneously provided an involuntary manslaughter instruction when the jury requested clarification of the crime of voluntary manslaughter. Instead, the court of appeals concluded that "either the trial court misspoke or the statement was mistranscribed by the court reporter." The Michigan Supreme Court refused to intervene.

Consequently, Hardaway filed a § 2254 petition wherein he argued that he was denied his right to due process when the trial court erroneously instructed the jury on involuntary manslaughter instruction instead of voluntary manslaughter. The district court granted relief and the Warden filed a timely notice of appeal.

The AEDPA requires federal courts to "presume the correctness" of the state court factual findings absent clear and convincing evidence of incorrectness. The statutory presumption of correctness, found in 28 U.S.C. § 2254(e)(1), extends to factual findings made by state appellate courts on the basis of their review of trial court records.

The 6<sup>th</sup> Circuit observed that the trial court's phrase "second degree involuntary manslaughter" made no sense in the context of the transcript. Instead, it would have made perfect sense for the judge to say second degree murder and voluntary manslaughter. Moreover, given the text of the jury's note, the logical inference was that if the judge did not mispeak, he was simply indicating that he sent the jury copies of both the second degree murder instruction and the voluntary manslaughter instruction.

The Michigan Court of Appeals found that the hard copy of the manslaughter instruction furnished to the jury replicated the voluntary manslaughter instruction which the judge had given to the jury as part of the original charge. Consequently, the document sent to the jury room, according to the state

appellate court, was not an involuntary manslaughter instruction. Instead, the instruction was the voluntary manslaughter instruction.

The only evidence offered to rebut the statutory presumption as to the correctness of the state court's finding consisted of a non-statutory presumption as to the correctness of every word in the transcript. However, the 6<sup>th</sup> Circuit found that this nonstatutory presumption did not trump the § 2254(e)(1)'s presumption of correctness.

Presumptions aside, the 6<sup>th</sup> Circuit found that the determination made by the Michigan Court of Appeals was sensible. What the jury's note was asking for was the second degree murder and the voluntary manslaughter instructions that the jury had already heard the trial court deliver. The only manslaughter instruction on the table dealt with voluntary manslaughter. It would have made no sense for the judge to withhold the voluntary manslaughter instruction that he had already given and read an involuntary manslaughter instruction of which the jury had known nothing and about which it had not inquired.

In sum, unwilling to suspend the exercise of its common sense, "the Michigan Court of Appeals gave the obvious answer: the transcript notwithstanding, the trial judge had not given the jury a new and different instruction on manslaughter." Consequently, the district court's order granting habeas relief on the basis of the trial court's alleged delivery of an involuntary manslaughter instruction was reversed and the case was remanded for dismissal.

#### **Summary of Defense Victories**

*Hope*, p. 3; *Shelton*, p. 7; *Butler*, p. 23; *Cleaves*, p. 32; *Lyons*, p. 33; *Miller*, p. 35; *Sawyer*, p. 35; *Hill*, p. 37; *Haynes*, p. 38; *Hargrove*, p. 40; *Truman*, p. 58; *Modena*, p. 65; *Green*, p. 75; *Chance*, p. 79; *Davis*, p. 84; *Townsend*, p. 87.

### **INDEX OF CASES** **GENERAL**

#### **Agreement Not To Prosecute**

*Butler*, p. 23.

#### **Aiding and Abetting**

*Davis*, p. 84.

#### **Allocution**

*Green*, p. 75.

#### **Anticipatory Search Warrant**

*Miggins*, p. 40.

#### **Appellate Subject Matter Jurisdiction**

*Yeager*, p. 73.

#### **Apprendi**

*Burns*, p. 18; *Cleaves*, p. 32; *Stewart*, p. 49; *Copeland*, p. 69; *Chapman*, p. 88; *Goode*, p. 90.

#### **Armed Career Criminal**

*Cooper*, p. 62.

#### **Attorney's Fees**

*Elkins*, p. 28.

#### **Batson**

*Copeland*, p. 69.

#### **Brady Violation**

*Sawyer*, p. 35; *Hutchison*, p. 54; *Davis*, p. 84.

#### **Breach of Plea Agreement**

*Butler*, p. 23.

#### **Bruton Problem**

*Hutchison*, p. 54.

#### **CCE**

*Burns*, p. 18.

#### **Co-Conspirator's Statements**

*Anthony*, p. 9.

#### **Coerced Confession**

*Haynes*, p. 38.

#### **Collateral Order Doctrine**

*Yeager*, p. 73.

#### **Commerce Clause**

*Norton*, p. 26.

**Conditions of Supervised Release**

*Modena*, p. 65.

**Confrontation Clause**

*Anthony*, p. 9.

**Consent**

*Elkins*, p. 28; *Haynes*, p. 38.

**Cruel and Unusual Punishment**

*Hope*, p. 3.

**Defective Indictment**

*Davis*, p. 84.

**Delegation of Determining the Amount of Restitution**

*Butler*, p. 23; *Davis*, p. 84.

**Dismissal Without Prejudice**

*Yeager*, p. 73.

**Duplicity**

*Davis*, p. 84.

**Entrapment**

*Burns*, p. 18.

**Executing the Mentally Retarded**

*Hill*, p. 37.

**Exigent Circumstances**

*Elkins*, p. 28; *Haynes*, p. 38.

**First Amendment**

*Norton*, p. 26.

**Franks Hearing**

*Elkins*, p. 28; *Stewart*, p. 49.

**Harmless Error**

*Stewart*, p. 49; *Copeland*, p. 69.

**Independent Source Doctrine**

*Haynes*, p. 38.

**Ineffective Assistance of Counsel**

*Bell*, p. 1; *Lyons*, p. 33; *Miller*, p. 35; *Hutchison*, p. 54.

**Jencks Act**

*Davis*, p. 84.

**Law of the Case Doctrine**

*Tocco*, p. 68.

**Lying Before the Grand Jury**

*Burns*, p. 18.

**Miranda Rights**

*Miggins*, p. 40.

**Missing Transcript**

*Scott*, p. 64.

**Other Acts Evidence**

*Stevens*, p. 47; *Copeland*, p. 69.

**Overbreadth**

*Norton*, p. 26.

**Plain Error**

*Hopkins*, p. 5; *Cleaves*, p. 32; *Stewart*, p. 49.

**Plain View**

*Elkins*, p. 28; *Modena*, p. 65.

**Pretext Stops**

*Bailey*, p. 60.

**Prosecutorial Misconduct**

*Hutchison*, p. 54; *Scott*, p. 64; *Modena*, p. 65; *Green*, p. 75.

**Reasonable Suspicion**

*Orsolini*, p. 45; *Bailey*, p. 60; *Townsend*, p. 87.

**Retroactive Application**

*Goode*, p. 90.

**RICO**

*Chance*, p. 79.

**Right to Counsel v. Privilege Against Self-Incrimination**

*Askarov*, p. 44.

**Right to Present a Defense**

*Rockwell*, p. 12.

**Right to Transcript**

*Scott*, p. 64.

**Search and Seizure**

*Burns*, p. 18; *Elkins*, p. 28; *Haynes*, p. 38; *Miggins*, p. 41; *Orsolini*, p. 45; *Stewart*, p. 49; *Bailey*, p. 60; *Copeland*, p. 69; *Elmore*, p. 77; *Townsend*, p.87; *Chapman*, p. 88.

**Self-Representation**

*Modena*, p. 65.

**Sequestration Order**

*Green*, p. 75.

**Severance**

*Chavis*, p. 15; *Hutchison*, p. 54.

**Sexual Predator**

*Leslie*, p. 14.

**Spoilation of Evidence**

*Copeland*, p. 69.

**Statute of Limitations**

*Butler*, p. 23.

**Statutory Sentencing Range**

*Hopkins*, p. 5.

**Structural Error**

*Stewart*, p. 49.

**Subject Matter Jurisdiction**

*Norton*, p. 26.

**Sufficiency of Evidence**

*Chavis*, p. 15; *Burns*, p. 18; *Chance*, p. 79; *Davis*, p. 84.

**Summaries**

*Modena*, p. 65.

**Terry Stops**

*Orsolini*, p. 45; *Bailey*, p. 60; *Chapman*, p.88.

**Travel Act**

*Burns*, p. 18.

**Type of Remand**

*Tocco*, p. 68.

**Use of a Telecommunications Facility**

*Burns*, p. 18.

**Vagueness**

*Norton*, p. 26.

**Violent Felonies**

*Cooper*, p. 62.

**Vouching for the Credibility of Witnesses**

*Modena*, p. 65.

**“Watershed Rule”**

*Goode*, p. 90.

**Wiretap**

*Stewart*, p. 49.

**Withdrawing Guilty Plea**

*Butler*, p. 23.

**HABEAS****“Clearly Established Federal Law”**

*Lyons*, p. 33.

**“Contrary To”**

*Lyons*, p. 33.

**Direct Appeal**

*Marcum*, p. 44.

**Evidentiary Hearing**

*Sawyer*, p. 35; *Hutchison*, p. 54.

**“In Custody”**

*Leslie*, p. 14.

**Mixed Petition**

*Hill*, p. 37.

**Presumption of Correctness**

*Hardaway*, p. 92.

**Procedural Default**

*Hutchison*, p. 54; *Scott*, p. 64.

**Second and Successive Petitions**

*Shelton*, p. 7.

**Statute of Limitations**

*Cook*, p. 4; *Marcum*, p. 44.

**Tolling**

*Cook*, p. 4; *Hargrove*, p. 40.

**“Unreasonable Application of”**

*Lyons*, p. 33; *Miller*, p. 35; *Sawyer*, p. 35.

**SENTENCING**

**Acceptance of Responsibility (§ 3E1.1)**

*Chavis*, p. 15.

**Accessory After the Fact (§2X3.1)**

*Kimble*, p. 91.

**Concurrent v. Consecutive Sentence  
§ 5G1.3(b))**

*Dunham*, p. 6.

**Cooperation Agreements (§ 1B1.8)**

*Hopkins*, p. 5.

**Dangerous Weapon (§ 2B3.1(b)(2)(E))**

*Rodriguez*, p. 62.

**Downward Departure**

*Stewart*, p. 49; *Tocco*, p. 68.

**Ex Post Facto**

*Green*, p. 75.

**Grouping (§ 3D1.4)**

*Lewis*, p. 8; *Green*, p. 75.

**Substantial Risk of Death or Serious  
Bodily Injury (2K1.4(a)(1)(A)**

*Stevens*, p. 47.

**Minor Role (§ 3B1.2(b))**

*Burns*, p. 18.

**Obstruction of Justice (2J1.2)**

*Kimble*, p. 91.

**Obstruction of Justice (§ 3C1.1)**

*Dunham*, p. 6; *Chance*, p. 79.

**Possession of Firearm (§ 2D1.1(b)(1))**

*Miggins*, p. 41; *Stewart*, p. 49.

**Relevant Conduct (§ 1B1.3)**

*Chavis*, p. 15.

**Role Enhancement (§ 3B1.1)**

*Tocco*, p. 68.

**Substantial Assistance (§ 5K2.0)**

*Truman*, p. 58.

**Split Sentence (§ 5C1.1(d))**

*Butler*, p. 23.

**Threat of Death (§ 2B3.1(b)(2)(F))**

*Winbush*, p. 13.

**Upward Departure**

*Chance*, p. 79.

**Use of Sophisticated Means  
(§ 2T1.1(b)(2))**

*Butler*, p. 23.